# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1928

## No. 481

ROBERT H. LUCAS, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF KENTUCKY, PETITIONER

vs.

A. J. A. ALEXANDER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX


| | Original | Print |
|---|---|---|
| Record from District Court of the United States, Western Kentucky | 1 | 1 |
| Caption (omitted in printing) | 1 | 1 |
| Petition | 1 | 1 |
| Amended petition | 8 | 6 |
| Exhibit—Insurance bond | 16 | 12 |
| Order redepositions | 31 | 24 |
| Answer | 31 | 24 |
| Amended petition | 34 | 25 |
| Amended answer | 36 | 27 |
| General demurrer | 37 | 28 |
| Opinion, Dawson, J. | 37 | 28 |
| Judgment and findings of fact | 44 | 33 |
| Order extending time for filing bill of exceptions | 51 | 39 |
| Order filing bill of exceptions | 52 | 39 |
| Bill of exceptions | 52 | 39 |
| Waiver of jury trial and stipulation of facts | 52 | 39 |
| Stipulation re testimony | 58 | 43 |
| Testimony of— | | |
| Samuel L. Wilson | 58 | 44 |
| Walter G. Bowerman | 61 | 46 |
| Order settling bill of exceptions | 79 | 61 |
| Plaintiff's petition for writ of error | 80 | 61 |
| Plaintiff's assignment of errors | 80 | 61 |
| Defendant's petition for writ of error | 81 | 62 |
| Defendant's assignment of errors | 82 | 62 |

| Record from District Court of the United States, Western Kentucky—Continued. | Original | Print |
|---|---|---|
| Order allowing writ of error for both plaintiff and defendant | 83 | 64 |
| Stipulation re record | 84 | 64 |
| Motion for judgment on behalf of defendant | 86 | 65 |
| Writ of error | 87 | 66 |
| Cross-writ of error | 88 | 67 |
| Waiver of citation | 90 | 67 |
| Defendant's praecipe | 90 | 68 |
| Clerk's certificate | 91 | 68 |
| Proceeding in United States Circuit Court of Appeals, Sixth Circuit | 92 | 69 |
| Appearance of counsel (omitted in printing) | 92 | 69 |
| Motion to dismiss | 92 | 69 |
| Argument and submission (omitted in printing) | 93 | 69 |
| Judgment | 93 | 69 |
| Opinion, Mack, J | 94 | 70 |
| Motions to stay mandate | 100 | 74 |
| Clerk's certificate (omitted in printing) | 101 | 75 |
| Order allowing certiorari | 102 | 75 |

1 In United States District Court for the Western District of Kentucky

[Caption omitted.]

A. J. A. ALEXANDER, PLAINTIFF

vs.

ROBT. H. LUCUS, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT of Kentucky, defendant

*Petition*

Filed May 27, 1924

The plaintiff, A. J. A. Alexander, says he is a citizen of Kentucky, and resides at Spring Station in the eastern district of Kentucky.

Plaintiff says the defendant, Robert H. Lucas, is the duly acting and qualified collector of internal revenue for the district of Kentucky, and has been since the 24th day of May, 1921, and is a resident of Louisville, Kentucky.

The plaintiff says that for the year of 1919 and before March 15, 1920, he filed with the collector of internal revenue for the district of Kentucky his income-tax return, and showed thereon the following income and deductions:

2

| | |
|---|---|
| Farming | $22,469.00 |
| Salary | 2,000.00 |
| Security Trust Co. | 5,200.00 |
| Rents | 28,652.34 |
| Income ins. policy | 00 |
| Int. on bonds | |
| Foreign countries | 163.79 |
| Dividends on insurance policies | 17,290.35 |
| Dividends | 2,997.06 |
| | $78,773.23 |
| Deductions: | |
| Interest paid | 1,005.00 |
| Taxes paid | 237.67 |
| Contributions | 11,560.35 |
| | $12,803.02 |
| Net income | $65,880.21 |

Plaintiff says that on the above income he claimed a personal exemption of $1,400.00, and paid taxes thereon in the sum of $13,155.52.

Plaintiff says that there was reported in the above income as dividends on a paid-up life insurance $17,290.35.

Plaintiff says on the 19th day of May, 1899, he procured from the New York Life Insurance Company two life policies of $50,000.00 each, maturing on May 19, 1919; that said policies provided for the payment of an annual premium on each of them of $3,905.00 for a period of ten years.

Plaintiff says that said premiums were paid commencing on the 19th day of May, 1899, and continuing to and including May 19, 1918, the total premiums paid being $78,100.00.

Each of the above policies had the following provisions as to the maturity thereof, and certain option to be exercised at the end of the premium-paying period:

"This insurance bond participates in surplus as hereinafter provided, but no dividend shall be apportioned to it before the end of the accumulation period. If the insured elects to continue this insurance bond beyond the accumulation period, under one of the two accumulation benefits first named below, no further dividend shall be apportioned to it before the end of each period of five years thereafter.

3 "The accumulation period of this insurance bond ends on the nineteenth day of May in the year nineteen hundred and nineteen. If the insured is living, and if the premiums have been duly paid to that date, and not otherwise, the company will then apportion a dividend to the insured, who shall have the option of continuing or discontinuing this insurance bond under one of the following four accumulation benefits:

"(1) Receive an income of two thousand dollars and ——— cents per annum during life (being equal to four per cent on the initial amount of the insurance ($50,000), the first payment to be made on the nineteenth day of May, nineteen hundred and twenty, and receive the dividend converted into a life annuity, payable with the income as above, and continue this insurance bond without further payment of premiums (evidence of good health will not be required, or

"(2) Receive the dividend in cash, and receive an income for life payable as specified in the 'first benefit' and continue this insurance bond without further payment of premiums (evidence of good health will not be required) or

"(3) Receive the entire cash value, as stated below, converted into an annual income during the life of the insured, payable as provided in the 'first benefit' which income the company guarantees shall be not less than thirty-four hundred and seventy-four dollars and ——— cents and discontinue this insurance bond, or

"(4) Receive the entire cash value, as stated below, in cash, and discontinue this insurance bond.

"The company guarantees that the entire cash value of this insurance bond at the end of the accumulation period shall be fifty thousand dollars, and in addition the cash dividend then apportioned by the company. At the end of the accumulation period the company will send the insured a written statement setting forth the results under each of the above accumulation benefits, and if the insured shall fail at that time to notify the company which benefit has been selected, the first benefit shall be considered selected.

"The accumulation period of this bond ends on the 19th day of May in the year 1919, if the insured is living and the premiums have been duly paid to that date, and not otherwise."

4 Plaintiff says he is unable to file copies of the above policies, because same have been surrendered to the insurance company and photostatic copies thereof are in the possession of the Commissioner of Internal Revenue.

Plaintiff says when said policies matured on May 19, 1919, there was paid to him by the insurance companies $120,797.00.

Plaintiff says that on May 19, 1922, the Commissioner of Internal Revenue, by letter, notified him that said commissioner disagreed with him as to the net income arising from the proceeds of the above policy and determined that the taxable income arising therefrom was $42,697.00, instead of $17,290.35, as reported by the plaintiff in his income-tax return.

Plaintiff says in determining the March 1, 1923, value of his insurance policies, he used a compound rate of interest of .0283 on the combined annual premium on both policies, to wit, $7,810.00, and this method showed a value March 1, 1913, of $103,560.65.

Plaintiff says the Commissioner of Internal Revenue treated the March 1, 1913, value of the policies as the sum of the premiums paid, to wit, $78,100.00, and increased the taxable net income of the plaintiff as heretofore stated.

Plaintiff says that the policies above described were participating policies, and there was added to each of them annual accumulations from date of issue to date of maturity, but under the provisions of said policies the accumulations could not be withdrawn until the maturity of said policies.

Plaintiff says that the policies above referred to were worth on March 1, 1913, $103,506.65, and the Commissioner of Internal Revenue was in error in valuing said policies on said date at $78,100.00.

Paragraph 2. Plaintiff says on the 2nd day of December, 1902, A. J. Alexander, his father, died testate and left surviving him five children, two of whom subsequently died. All of said children were the beneficiaries under said will.

Plaintiff says under the tenth clause of said will a trust estate was created in the following language:

"All other property of every description which I may own at the time of my death, real, personal, and mixed, except that specifically devised by this will, including one-half of the rents from the Ashland Block and Ashland Annex properties referred to in the eighth

5 clause of this will, and including also all of the income from my stock in the Ashland Block and Ashland Annex Company, which stocks are disposed of in the ninth clause of this will and any property or estate that may hereafter fall into my estate by reversion or otherwise, I give to my executors with which to create a sinking fund to meet any and all obligations on my estate, such as debts, unexecuted contracts, legacies, and bequests, and also to raise the fund of five hundred thousand dollars hereinafter mentioned.

The funds thus provided to be invested and reinvested by my executors in their discretion, and as occasion may require to the satisfaction of the aforesaid obligations. And my executors are hereby authorized to make contracts, create debts, negotiate loans, sell and convey any property that may come into their hands under this clause and to invest and reinvest the proceeds, in their discretion. And when all liabilities against my estate have been fully paid and satisfied, all the remainder of the funds coming into their hands under this clause to be invested and reinvested in such properties and such securities as they may select for the purpose until the sum of five hundred thousand dollars has been realized, when the said sum shall be paid over and delivered to a trustee, or trustees, selected by them for the purpose, who shall hold the same in trust, investing and reinvesting the same for the purposes of income, for the use and benefit of my five children in equal shares, the interest and income on which to be paid semiannually, to my said children during their lives, the interest of any child or children that may die leaving descendents to be paid over to such descendents, per stirpes, and the interest of any child or children dying without descendents living at the time of his or her death, to pass to and be paid to my surviving children and to the descendents of any that may have died leaving descendents, per stirpes, until the death of all my children, at which time the said principal sum of five hundred thousand dollars is to be paid over and delivered to the descendents of my children then living per stirpes. The trustee or trustees are to be appointed by the proper court and to execute bonds with security as required by law in such cases.

When the aforesaid fund of five hundred thousand dollars
6 has been accumulated and placed in the hands of the trustee or trustees as hereinbefore directed, then all the restrictions and limitations placed by this will upon the Ashland Block and Ashland Annex properties devised by this will to my children and their descendents shall be immediately removed, and the said properties and stocks conveyed in the ninth clause shall thenceforth be owned, held, used, and enjoyed by my wife and children share and share alike, one-sixth to each and the descendents per stirpes, freed from any and all limitations or trusts created by this will, and may be controlled or disposed of by them at their pleasure."

Plaintiff says the Security Trust Company, of Lexington, Kentucky, a corporation incorporated under the laws of the State of Kentucky, with power to contract and be contracted with, to sue and be sued, and to perform the duties of a trustee, was appointed trustee under said will and paid to him during the year of 1919, $5,200.00, and that said sum was included in his taxable income for the year 1919, and the tax paid thereon.

Plaintiff says that said sum was a gift and is not taxable.

Plaintiff says that his true gross income and deductions for the year 1919 were as follows:

Gross Income

| | | |
|---|---|---|
| Income from farming | | $61,416.45 |
| Deductions: | | |
| Labor | 87,195.42 | |
| Material & supplies | 12,154.87 | |
| Merchandise bought for resale | 32,972.40 | |
| General expense | 2,075.75 | |
| Inventory at beginning of year | 36,980.00 | |
| | 891,378.44 | |
| Less inventory at end of year | 59,365.00 | |
| | 832,013.44 | |
| Other deductions: | | |
| Salaries | 3,612.78 | |
| Rent | 24.00 | |
| Interest | 780.67 | |
| Taxes | 1,809.00 | |
| Repairs | 650.50 | |
| | | 38,947.39 |
| Net income from farming | | 822,469.06 |
| 7 Salaries | | 2,000.00 |
| Income from rents | 45,842.51 | |
| Deductions: | | |
| Repairs, wear and tear | 3,474.37 | |
| Interest | 4,588.33 | |
| Taxes | 4,548.15 | |
| Other expenses | 7,312.41 | |
| | 19,913.86 | |
| Income from rents | | 25,928.65 |
| Income from insurance policies subject to normal tax | | 21,000.00 |
| Dividends on stock of foreign corporation | | 163.79 |
| Dividends on insurance policies | | 2,807.06 |
| Dividends from other corporations | | 4,337.11 |
| Income from all sources | | $79,796.30 |
| Deductions: | | |
| Interest paid | 1,065.00 | |
| Taxes paid | 237.67 | |
| Contributions | 11,774.04 | |
| | | 13,076.71 |
| Taxable net income | | $66,719.59 |

Plaintiff says the tax due on this sum was $14,539.05.

Plaintiff says the Commissioner of Internal Revenue assessed and certified for collection to the defendant, Robert H. Lucas, income taxes against him for the year of 1919 in the sum of $26,579.94, and on October 26, 1923, in order to avoid the imposition of penalties and the seizure of his property, to satisfy said taxes, he paid under protest to the defendant, Robert H. Lucas, the taxes demanded, and on said date he filed with the defendant, Robert H. Lucas, a claim for refund in the sum of $12,441.60, said claim being immediately forwarded to the Commissioner of Internal Revenue for his consideration.

Plaintiff says that notwithstanding the fact that the Commissioner of Internal Revenue has had before him for his consideration said claim for refund for more than six months, he has declined and failed to either approve or reject same.

Wherefore plaintiff prays judgment against the defendant, Robert H. Lucas, collector of internal revenue, for the sum of $12,040.89, with six per cent interest thereon from October 26, 1923, until paid.

BECKHAM, HAMILTON & BECKHAM,
*Attorneys for Plaintiff.*

8 The plaintiff, A. J. A. Alexander, says the statements of the foregoing petition are true as he verily believes.

A. J. A. ALEXANDER.

Subscribed and sworn to before me this 26 day of May, 1924.

[SEAL.] S. A. WALLACE,
*Notary Public, Fayette Co., Ky.*

In United States District Court

*Amended petition*

Filed November 6, 1924

Paragraph 1. Comes the plaintiff by leave of court and for amendment his petition heretofore filed says:

The plaintiff, A. J. A. Alexander, says he is a citizen of Kentucky, and resides at Spring Station in the eastern district of Kentucky.

Plaintiff says the defendant, Robert H. Lucas, is the duly acting and qualifying collector of internal revenue for the district of Kentucky, and has been since the 24th day of May, 1921, and is a resident of Louisville, Kentucky.

The plaintiff says that for the year of 1919 and before March 15, 1920, he filed with the collector of internal revenue for the district of Kentucky his income tax return, and showed thereon the following income and deductions:

| | |
|---|---|
| Farming | $22,439.69 |
| Salary | 2,000.00 |
| Security Trust Co. | 5,200.00 |
| Bonds | 28,632.34 |
| Income ins. policy | 60 |
| Int. on bonds | |
| Foreign countries | 163.79 |
| 9 Dividends on insurance policies | 17,290.35 |
| Dividends | 2,197.66 |
| | 78,773.23 |
| Deductions: | |
| Interest paid | 1,065.00 |
| Taxes paid | 257.67 |
| Contributions | 11,070.92 |
| | 12,893.62 |
| Net income | 65,880.21 |

Plaintiff says that on the above income he claimed a personal exemption of $1,400.00, and paid taxes thereon in the sum of $13,135.32.

Plaintiff says that there was reported in the above income as dividends on the life-insurance policies hereinafter described $17,290.35.

Plaintiff says on the 19th day of May, 1899, he procured from the New York Life Insurance Company two life-insurance policies of $50,000.00 each, maturing on May 19, 1919; that said policies provided for the payment of an annual premium on each of them of $3,905.00 for a period of ten years.

Plaintiff says that said premiums were paid commencing on the 19th day of May, 1899, and continuing to and including May 19, 1908, the total premiums paid being $78,100.00.

Each of the above policies had the following provisions as to the maturity thereof, and certain options to be exercised at the end of the premium-paying period:

"This insurance bond participates in surplus as hereinafter provided, but no dividend shall be apportioned to it before the end of the accumulation period. If the insured elects to continue this insurance bond beyond the accumulation period under one of the two accumulation benefits first named below, no further dividend shall be apportioned to it before the end of each period of five years thereafter.

"The accumulation period of this insurance bond ends on the nineteenth day of May in the year nineteen hundred and nineteen. If the insured is living, and if the premiums have been duly paid to that date and not otherwise, the company will then apportion a dividend to the insured, who shall have the option of continuing or discontinuing this insurance bond under one of the following four accumulation benefits:

"(1) Receive an income of two thousand dollars and ——— cents per annum during life (being equal to four per cent on the initial amount of the insurance ($50,000), the first payment to be made on the nineteenth day of May, nineteen hundred and twenty, and receive the dividend converted into a life annuity, payable with the income as above, and continue this insurance bond without further payment of premiums (evidence of good health will not be required); or

"(2) Receive the dividend in cash and receive an income for life, payable as specified in the 'first benefit' and continue this insurance bond without further payment or premiums (evidence of good health will not be required); or

"(3) Receive the entire cash value, as stated below, converted into an annual income during the life of the insured, payable as provided in the 'first benefit,' which income the company guarantees shall be not less than thirty-four hundred and seventy-four dollars and ——— cents and discontinue this insurance bond; or

"(4) Receive the entire cash value, as stated below, in cash and discontinue this insurance bond.

"The company guarantees that the entire cash value of this insurance bond at the end of the accumulation period shall be fifty thousand dollars, and in addition the cash dividend then apportioned

by the company. At the end of the accumulation period the company will send the insured a written statement setting forth the results under each of the above accumulation benefits, and if the insured shall fail at that time to notify the company which benefit has been selected the first benefit shall be considered selected.

"The accumulation period of this bond ends on the 19th day of May in the year 1919 if the insured is living and the premiums have been duly paid to that date and not otherwise."

Plaintiff says he is unable to file copies of the above policies, because same have been surrendered to the insurance company and photostatic copies thereof are in the possession of the Commissioner of Internal Revenue.

11 Plaintiff says when said policies matured on May 19, 1919, there was paid to him by the insurance company $120,797.00.

Plaintiff says that on May 19, 1922, the Commissioner of Internal Revenue, by letter, notified him that said commissioner disagreed with him as to the net income arising from the proceeds of the above policies and determined that the taxable income arising therefrom was $42,697.00 instead of $17,290.35, as reported by the plaintiff in his income-tax return.

Plaintiff says in determining the March 1, 1913, value of his insurance policies, he used a compound rate of interest of .0283 on the combined annual premium on both policies, to wit, $7,810.00, and this method showed a value March 1, 1913, of $103,506.65.

Plaintiff says the Commissioner of Internal Revenue treated the March 1, 1913, value of the policies as the sum of the premiums paid, to wit, $78,100.00, and increased the taxable net income of the plaintiff as heretofore stated.

Plaintiff says that the policies above described were participating policies, and there was added to each of them annual accumulations from date of issue to date of maturity, but under the provisions of said policies the accumulations could not be withdrawn until the maturity of said policies.

Plaintiff says that the policies above referred to were worth on March 1, 1913, $115,511.00 and the Commissioner of Internal Revenue was in error in valuing said policies on said date of $78,100.00.

Paragraph 2. Plaintiff says on the 2nd day of December, 1902, A. J. Alexander, his father, died, testate and left surviving him five children, two of whom subsequently died. All of said children were beneficiaries under said will.

Plaintiff says under the tenth clause of said will a trust estate was created in the following language:

"All other property of every description which I may own at the time of my death, real, personal, and mixed, except that specifically devised by this will, including one-half of the rents from the Ashland Block and Ashland Annex, properties referred to in the eighth clause of this will, and including also the income from my stock in the Ashland Block Association and the Ashland Annex Company,

which stocks are disposed of in the ninth clause of this will,
12 and any property or estate that may hereafter fall into my estate by reversion or otherwise, I give to my executors with which to create a sinking fund to meet any and all obligations on my estate, such as debts, unexecuted contracts, legacies, and bequests, and also to raise the fund of five hundred thousand dollars hereinafter mentioned. The funds thus provided to be invested and reinvested by my executors in their discretion, and as occasion may require to the satisfaction of the aforesaid obligations. And my executors are hereby authorized to make contracts, create debts, negotiate loans, sell and convey any property that may come into their hands under this clause, and to invest and reinvest the proceeds, in their discretion. And when all liabilities against my estate have been fully paid and satisfied, all the remainder of the funds coming into their hands under this clause to be invested and reinvested in such properties and such securities as they may select for the purpose until the sum of five hundred thousand dollars has been realized, when the said sum shall be paid over and delivered to a trustee or trustees selected by them for the purpose, who shall hold the same in trust, investing and reinvesting the same for the purpose of income, for the use and benefit of my five children in equal shares, the interest and income on which to be paid semiannually to my said children during their lives, the interest of any child or children that may die leaving descendants to be paid over to such descendants, per stirpes, and the interest of any child or children dying without descendants living at the time of his or her death to pass to and be paid to my surviving children and to the descendants of any that may have died leaving descendants, per stirpes, until the death of all my children, at which time the said principal sum of five hundred thousand dollars is to be paid over and delivered to the descendants of my children then living, per stirpes. The trustee or trustees are to be appointed by the proper court and to execute bonds with security as required by law in such cases.

"When the aforesaid fund of five hundred thousand dollars has been accumulated and placed in the hands of the trustee or trustees as hereinbefore directed, then all the restrictions and limitations placed by this will upon the Ashland Block and Ashland Annex, properties devised by this Will to my children and their descend-
13 ants, shall be immediately removed and the said properties and stocks conveyed in the ninth clause shall thenceforth be owned, held, used, and enjoyed by my wife and children share and share alike, one-sixth to each and the descendants, per stirpes, freed from any and all limitations or trusts created by this will, and may be controlled or disposed of by them at their pleasure."

A copy of said will is filed herewith as part hereof marked Exhibit "A."

Plaintiff says the Security Trust Company, of Lexington, Kentucky, a corporation incorporated under the law of the State of Kentucky, with power to contract and be contracted with, to sue and be

sued, and to perform the duties of a trustee, was appointed trustee under said will and paid to him during the year of 1919, $5,200.00, and that said sum was included in his taxable income for the year 1919, and the tax paid thereon.

Plaintiff says that said sum was a gift and is not taxable.

Plaintiff says in his original income-tax return he reported in Schedule E 24,250.00 as rentals from the Ashland Block Association, Chicago, Illinois.

Plaintiff says that said income was one-third of the rentals paid by the Ashland Block Association which was his proportionate part. He says he failed to deduct from said rentals reasonable and fair depreciation to which he was entitled, which sum was $3,333.33, and that his net income from rents should have been $25,319.01 instead of $28,652.34.

Plaintiff says that his true gross income and deductions for the year 1919 were as follows:

Gross Income

| | | | |
|---|---|---|---|
| Income from farming | | | $61,416.48 |
| Deductions: | | | |
| Labor | | $7,195.42 | |
| Material and supplies | | 12,154.87 | |
| Merchandise bought for resale | | 32,972.40 | |
| General expense | | 2,075.75 | |
| Inventory at beginning of year | | 36,980.00 | |
| | | $91,378.44 | |
| Less inventory at end of year | | 59,365.00 | |
| | | $32,013.44 | |
| 14 Other deductions: | | | |
| Salaries | | 3,612.78 | |
| Rent | | 24.00 | |
| Interest | | 780.67 | |
| Taxes | | 1,923.00 | |
| Repairs | | 656.50 | |
| | | | 38,947.39 |
| Net income from farming | | | $22,469.09 |
| Salaries | | | 7,000.00 |
| Income from rents | | 45,842.51 | |
| Deductions: | | | |
| Repairs, wear & tear | $4,084.61 | | |
| Interest | 4,583.33 | | |
| Taxes | 4,343.15 | | |
| Other expenses | 7,312.41 | | |
| | | 20,323.50 | |
| Income from rents | | | $25,519.01 |
| Dividends on stock of foreign corporations | | | 165.79 |
| Dividends on insurance policies | | | 5,286.00 |
| Dividends from other corporations | | | 2,007.05 |
| | | | $59,295.35 |
| Deductions: | | | |
| Interest paid | | 1,085.00 | |
| Taxes paid | | 237.67 | |
| Contributions | | 8,520.93 | |
| | | | 9,842.60 |
| Taxable net income | | | 48,252.95 |

Plaintiff says the tax due on this sum was $7,997.11.

Plaintiff says that at the time he filed his original return he paid to the collector of internal revenue $13,135.52, and in October, 1923, the Commissioner of Internal Revenue certified to the defendant Robert H. Lucas, collector of internal revenue for the district of Kentucky an additional assessment of income taxes for the year 1919 of $11,334.17, said assessment being caused by the act of the Commissioner of Internal Revenue in valuing the income received on the insurance policies as above set out.

Plaintiff says on October 26, 1923, in order to avoid the imposition of penalties and the seizure of his property to satisfy said taxes he paid to the defendant under protest the said additional assessment, to wit, $11,334.17.

Plaintiff says on October 26, 1923, he filed with the defendant
15 a claim for refund of the taxes erroneously assessed against and collected from him and for such greater amount as was legally refundable.

Plaintiff says that said claim for refund was immediately forwarded to the Commissioner of Internal Revenue for his consideration, and notwithstanding this fact the said commissioner has declined, failed, and refused to either refund the taxes paid or to reject the claim filed.

Plaintiff says that the defendant Robert H. Lucas, collector of internal revenue, is truly and justly indebted to him in the sum of $11,334.17 for income taxes erroneously assessed and paid under protest for 1919 and the United States is truly and justly indebted to him in the sum of $5,138.41 for income taxes erroneously paid by plaintiff under a mistake of law at the time he filed his original income-tax return for 1919.

Plaintiff says he has set out his gross income and deductions in full in order that his true tax liability may be determined, but that he is only seeking to recover in this action $11,334.17, the amount of taxes paid under protest to the defendant, and has instituted separate action against the United States for $5,138.41 for the taxes erroneously paid but not under protest for 1919.

Wherefore plaintiff prays judgment against the defendant, Robert H. Lucas, collector of internal revenue, for $11,334.17, with interest from October 26, 1923, until paid, and for his cost and all proper relief.

BECKHAM, HAMILTON & BECKHAM,
*Attorneys for Plaintiff.*

The plaintiff, A. J. A. Alexander, says the statements of the foregoing petition are true, as he verily believes.

A. J. A. ALEXANDER.

Subscribed and sworn to before me this the 18 day of Oct. 1924.

JNO. S. YELLMAN,
*Notary Public.*

Notary public, Fayette Co., Ky. My commission expires Mar. 20th, 1925.

16 *Exhibit with petition*

Filed Dec. 30, 1924

**New York Life Insurance Company insurance bond guaranteed interest. Life of Alexander J. A. Alexander. Policy No. 950777. Amount, $50,000. No. 950777. $50,000.**

New York Insurance Company by this insurance bond, with guaranteed interest, agrees to pay fifty thousand dollars to the insured's executors, administrators, or assigns, or to such other beneficiary as may be designated by the insured as hereinafter provided, at the home office of the company, in the city of New York, immediately upon receipt and approval of proofs of the death of Alexander J. A. Alexander, of ———, in the county of Woodford, State of Kentucky (herein called the insured).

Premium refund.

And the company further agrees to pay in addition to the face amount of this insurance bond, as shown on the next page hereof, if the death of the insured shall occur before the nineteenth day of May, nineteen hundred and nineteen, the addition being equal to the excess over the face amount of the total amount of premiums paid (taken at the tabular annual rate), with interest compounded at the rate of four per cent per annum from the date of each payment to the date of death.

Age 34.

And the company further agrees that this insurance bond shall be incontestable after it has been in force one full year if the premiums have been fully paid.

Annual premium.

This contract is made in consideration of the written application of the insured, which is a part of this contract, and in further consideration of the sum of thirty-nine hundred and five dollars and no cents, to be paid in advance, and of the payment of a like sum on the nineteenth day of May in every year thereafter during the continuance of this insurance bond until ten full years' premiums shall have been paid.

$3,905.

The special advantages, benefits, and provisions printed or written by the company on the following pages

17 are conditions precedent and are a part of this contract as full as if they were recited at length over the signatures hereto affixed.

Examined. H.H. Hall.

In witness whereof the New York Life Insurance Company has caused this contract to be signed by its president, secretary, countersigned by its registrar or assis-

ant registrar, and delivered this fifth day of June one thousand eight hundred and ninety-nine.

(Signed) JOHN A. MCCALL,
*President.*

(Signed) CHARLES C. WHITNEY,
*Secretary.*

(Signed) WM. A. FERREIA,
*Assistant Registrar.*

Insurance bond with guaranteed interest and annual loans, beneficiary clause, 20-yr. accumulation. 98-284. No. 950778. $5000

BENEFIT AND PROVISIONS

1. LOANS

With interest at the rate of five per cent per annum.

The company will make advances to the insured as loans on this insurance bond within the month of grace allowed in payment of premiums, on application to the home office, at the third or any subsequent anniversary of the insurance, within the accumulation period under the terms of the company's loan agreement then in use and the following conditions:

First. That premiums have been paid in full to the time when the loan is made, including the premium for the entire insurance year, then beginning.

Second. That the amount loaned at any time shall be such as the insured may desire, not to exceed the sums shown in the table on the preceding page. The amount of any loan shall include any previous loan then unpaid.

Third. That this insurance bond shall be duly assigned to the company as collateral security for the loan, and deposited at
18 the home office. A duplicate of the loan agreement, which is also a receipt for the bond, will be furnished to the insured.

Fourth. That interest in advance at the rate of five per cent per annum shall be paid on all loans from the date of the loan to the next anniversary of the insurance, and annually in advance thereafter, if the loans are renewed until they are paid off.

Fifth. That the loans shall be made for the period ending upon the next succeeding anniversary of the insurance, and may then be renewed simply by payment of the insurance premiums falling due and interest in advance, as above. Thus the loan may be renewed from year to year, at the option of the insured until the completion of the accumulation period.

By written notice to the company, the insured has charged the beneficiary of this policy to Kate Holloway Alexander, wife, or in the event of her prior death to insured's executors, administrators or assigns, November 25, 1918.

JOHN A. MCCALL,
*2nd Vice-President.*

2. NONFORFEITURE

This insurance bond can not be forfeited after it shall have been in force three full years, as hereinafter provided:

First. If any subsequent premium is not duly paid, this insurance will be endorsed for the amount of paid-up insurance specified in the table on the preceding page, less the value of any indebtedness on this bond, provided demand is made therefor with surrender of this bond within six months after such nonpayment, such paid-up insurance being payable either if the insured shall die before the nineteenth day of May, nineteen hundred and nineteen, or if the insured shall then be living; or, subject to the same conditions, this bond may be endorsed for the same amount of paid-up insurance, but payable at death only, with guaranteed annual income, beginning on the date specified in the first "accumulation benefit" on the preceding page equal to four per cent of the total amount of premiums paid, taken at the tabular annual rate; or,

19 Second. If any subsequent premium is not duly paid, and if this insurance bond is not surrendered as provided in the preceding clause, the insurance under this bond will, after the repayment of any indebtedness, be extended with request or demand therefor for the amount of fifty thousand dollars during the term provided in the table on the preceding page, payable only if the insured dies within said term. At the end of said term the insurance shall cease and the amount provided in the last column in said table will become payable if the insured is then living.

Third. The insurance provided for in the two preceding clauses shall be based upon completed insurance years only and shall be subject to the conditions of this insurance bond without further payment of premiums and without loans, participation in surplus, or premium return.

3. GRACE IN PAYMENT OF PREMIUMS

A grace of one month will be allowed in payment of premiums after this insurance bond shall have been in force three months, subject to an interest charge at the rate of five per cent per annum for the number of days during which the premium remains due and unpaid. During the month of grace this insurance bond remains in force and the unpaid premium, which interest as above remains an indebtedness to the company, which will be deducted from the amount payable under this bond if the death of the insured shall occur during the month.

4. REINSTATEMENT IN EVENT OF LAPSE

This insurance bond will be reinstated on written application therefor within six months after nonpayment of any premium, subject to evidence of good health satisfactory to the company and payment of

premiums to date of reinstatement with interest at the rate of five per cent per annum.

5. CHANGE OF BENEFICIARY

The insured may at any time during the continuance of this insurance bond, provided the bond is not then assigned, change the beneficiary or beneficiaries by written notice to the company at the home office, accompanied by this bond; such change to take effect on the endorsement of the same on the bond of the company.

20 6. GENERAL REGULATIONS

No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying any premium, to waive any forfeiture, or to bind the company by making any promise or making or receiving any representation or information. These powers can be exercised only by the president, vice president, second vice president, actuary, or secretary of the company and will not be delegated.

All premiums are due and payable at the home office unless otherwise agreed in writing, but may be paid to agent producing receipts signed by the president, vice president, second vice president, actuary, or secretary and countersigned by both agents. If any premium is not paid on or before the day when due, this insurance bond shall become void and all payment previously made shall remain the property of the company, except as hereinbefore provided.

Proofs of death must be furnished to the company at the home office within one year after the death of the insured, which proofs shall comprise satisfactory statements establishing the claim. Such statements must comply fully with the company's forms in use at the time of the death of the insured. If it is found that the age of the insured was incorrectly stated in the application on which this insurance bond was issued, the amount payable under this insurance bond shall be such proportion of the amount of the bond as the premium paid bears to the required premium at the true age.

Any indebtedness to the company, including any balance of the current year's premium remaining unpaid, will be deducted in any settlement of this insurance bond or of any benefit thereunder.

Any assignment of this insurance bond must be made in duplicate and both sent to the home office, one duplicate to be returned by the company and the other to be returned. The company has no responsibility for the validity of any assignment.

21 SPECIAL ADVANTAGES—TABLE OF AMOUNTS PAYABLE IN EVENT OF DEATH DURING THE ACCUMULATION PERIOD, IF PREMIUMS ARE PAID IN FULL TO DATE OF DEATH

The amount payable to the insured, in event of death prior to May 19th, 1919, as specified on the face of the bond, will be as set forth in the following table:

| Year | Amount payable | Year | Amount payable |
|---|---|---|---|
| First to tenth, inclusive | $50,000 | Sixteenth | $61,650 |
| Eleventh | 50,700 | Seventeenth | 64,150 |
| Twelfth | 52,700 | Eighteenth | 66,700 |
| Thirteenth | 54,800 | Nineteenth | 69,330 |
| Fourteenth | 57,000 | Twentieth | 72,130 |
| Fifteenth | 59,300 | | |

TABLE OF LOANS AND OF SURRENDER VALUES

In paid-up insurance or extended insurance, under the condition specified on the next page.

| At end of— | Loans | Paid-up insurance | Surrender values (extended insurance for $50,000 for the term specified below, with cash, if then living) |
|---|---|---|---|
| 3rd year | 1,300 | $15,000 | 17 years 0 months with $4,500 cash. |
| 4th " | 20,900 | 20,000 | 16 " 0 " " 11,700 " |
| 5th " | 15,900 | 25,000 | 15 " 0 " " 19,300 " |
| 6th " | 14,750 | 30,000 | 14 " 0 " " 25,250 " |
| 7th " | 20,100 | 35,000 | 13 " 0 " " 31,000 " |
| 8th " | 24,150 | 40,000 | 12 " 0 " " 36,500 " |
| 9th " | 28,000 | 45,000 | 11 " 0 " " 41,600 " |
| 10th " | 31,600 | | |
| 11th " | 35,700 | | |
| 12th " | 34,000 | | |
| 13th " | 37,100 | | |
| 14th " | 39,700 | | |
| 15th " | 42,200 | | |
| 16th " | 44,650 | | |
| 17th " | 46,900 | | |
| 18th " | 48,150 | | |
| 19th " | 49,300 | | |
| 20th " | For special advantages at end of accumulation period, see accumulation benefits below. | | |

22 ACCUMULATION GUARANTEED

This insurance bond participates in surplus as hereinafter provided, but no dividend shall be apportioned to it before the end of the accumulation period. If the insured elects to continue this insurance bond beyond the accumulation period, under one of the two accumulation benefits first named below, no further dividend shall be apportioned to it before the end of each period of five years thereafter.

The accumulation period of this insurance bond ends on the nineteen day of May in the year nineteen hundred and nineteen, if the insured is living and if the premiums have been duly paid to that date, and not otherwise.

The company will then apportion a dividend to the insured, who shall have the option of continuing, or discontinuing, this insurance under one of the following:

FOUR ACCUMULATION BENEFITS

(1) Receive an income of two thousand dollars and no cents per annum during life (being equal to four per cent on the initial amount of the insurance ($50,000), the first payment to be made on the nineteenth day of May, nineteen hundred and twenty, and receive the dividend converted into a life annuity, payable with the income above, and continue this insurance bond without further payment of premiums (evidence of good health will not be required); or,

(2) Receive the dividend, in cash, and receive an income for life payable as specified in the "first benefit" and continue this insurance bond without further payment of premiums (evidence of good health will not be required); or,

(3) Receive the entire cash value, as stated below, converted into an annual income during the life of the insured payable as provided in the "first benefit," which income the company guarantees shall be not less than thirty-four hundred and seventy-four dollars and no cents, and discontinue this insurance bond; or,

(4) Receive the entire cash value, as stated below, in cash, and discontinue this insurance bond.

The company guarantees that the entire cash value of this insurance bond at the end of the accumulation period shall be fifty
23 thousand dollars, and in addition the cash dividend then apportioned by the company.

At the end of the accumulation period the company will send the insured a written statement, setting forth the results under each of the above accumulation benefits, and if the insured shall fail at that time to notify the company which benefit has been selected, the first benefit shall be considered selected.

State of Kentucky,

County of Jefferson, ss:

I, Mildred M. Spalding, a notary public, in and for the State and county aforesaid, do hereby certify that the foregoing is a full, true, and complete copy of insurance policy issued by the New York Life Insurance Company on the life of Alexander A. J. Alexander, No. 93777, dated the 5th day of June, 1899, as appears from a photostatic copy of the original of said policy in my possession.

In testimony whereof I have hereunto set my hand and affixed the seal of my office at the city of Louisville, Kentucky, this 24th day of December, 1924.

My commission expires June 21, 1925.

[SEAL.] MILDRED M. SPALDING,
*Notary Public.*

## New York Life Insurance Company Insurance Bond with Guaranteed Interest Life of Alexander J. A. Alexander

### Policy No. 950778. Amount $50,000

New York Life Insurance Company agrees to pay fifty thousand dollars to the insured's executors, administrators, or assigns, or to such other beneficiary as may be designated by the insured as hereinafter provided, at the home office of the company, in the city of New York, immediately upon receipt and approval of proofs of the death of Alexander J. A. Alexander, of ———, in the county of Woodford, State of Kentucky (herein called the insured).

Premium returns. 24 And the company further agrees to pay in addition to the face amount of this insurance bond, as shown on the next page hereof, if the death of the insured shall occur before the nineteenth day of May, nineteen hundred and nineteen, the additional being equal to the excess over the face amount of the total amount of premiums paid (taken at the tabular annual rate), with interest compounded at the rate of four per cent per annum from the date of each payment to the date of death.

Age 24. And the company further agrees that this insurance bond shall be incontestable after it has been in force one full year, if the premiums have been duly paid.

Annual premium. This contract is made in consideration of the written application of the insured, which is a part of this contract, and in further consideration of the sum of thirty-nine hundred and five dollars and no cents, to be paid in advance, and of the payment of a like sum on the nineteenth day of May in every year thereafter during the continuance of this insurance bond until ten full years' premiums shall have been paid.

$3,905. The special advantages, benefits, and provisions printed or written by the company on the following pages are conditions precedent and are a part of this contract as fully as if they were recited at length over the signature hereto affixed.

In witness whereof the New York Life Insurance Company has caused this contract to be signed by its president, secretary, countersigned by its registrar or assistant registrar, and delivered this fifth day of June, one thousand eight hundred and ninety nine. Examined. EH. Enll.

(Signed) JOHN A. McCALL,
*President.*

(Signed) CHARLES C. WHITNEY,
*Secretary.*

(Signed) WM. A. FERRIEA,
*Assistant Registrar.*

Insurance bond with guaranteed interest and annual loans, beneficiary clause, 20-yr. accumulation, 98-284.

25 BENEFITS AND PROVISIONS

1. LOANS

With interest at the rate of five per cent per annum.

The company will make advances to the insured as loans on this insurance bond within the month of grace allowed in payment of premiums, on application to the home office at the third or any subsequent anniversary of the insurance, within the accumulation period, under the terms of the company's loan agreement then in use and the following conditions:

First. That premiums have been duly paid in full to the time when the loan is made, including the premium for the entire insurance year then beginning.

Second. That the amount loaned at any time shall be such as the insured may desire and not to exceed the sums shown in the table on the preceding page. The amount of any loan shall include any previous loan then unpaid.

Third. That this insurance bond shall be duly assigned to the company as collateral security for the loan and deposited at the home office. A duplicate of the loan agreement, which is also a receipt for the bond, will be furnished to the insured.

Fourth. That interest in advance at the rate of five per cent per annum shall be paid on all loans from the date of the loan to the next anniversary of the insurance, and annually in advance thereafter, if the loans are renewed until they are paid off.

Fifth. That the loans shall be made for the period ending upon the next succeeding anniversary of the insurance, and may then be renewed simply by payment of the insurance premiums falling due and interest in advance, as above. Thus the loan may be renewed from year to year, at the option of the insured, until the completion of the accumulation period.

2. NONFORFEITURE

This insurance bond can not be forfeited after it shall have been in force three full years, as hereinafter provided:

First. If any subsequent premium is not duly paid, this
26 insurance will be endorsed for the amount of paid-up insurance specified in the table on the preceding page, less the value of any indebtedness on this bond, provided demand is made therefor with surrender of this bond within six months after such nonpayment—such paid-up insurance being payable either if the insured shall die before the nineteenth day of May, nineteen hundred and nineteen, or if the insured shall then be living; or, subject to the same conditions, this bond may be endorsed for the same amount of paid-up insurance, but payable at death only, with a guaranteed annual income, beginning on the date specified in the first "accumulation benefit" on the preceding page equal to four per cent of the total amount of premiums paid, taken at the tabular annual rate; or,

Second. If any subsequent premuim is not duly paid, and if this insurance bond is not surrendered as provided in the preceding clause, the insurance under this bond will, after the repayment of any indebtedness, be extended without request or demand therefor for the amount of fifty thousand dollars during the term provided in the table on the preceding page, payable only if the insured dies within said term. At the end of said term the insurance shall cease and the amount provided in the last column in said table will become payable if the insured is then living.

Third. The insurance provided for in the two preceding clauses shall be based upon completed insurance years only, and shall be subject to the conditions of this insurance bond, but without further payment of premiums and without loans, participation in surplus, or premium return.

3. GRACE IN PAYMENT OF PREMIUMS

A grace of one month will be allowed in payment of premiums after this insurance bond shall have been in force three months, subject to an interest charge at the rate of five per cent per annum for the number of days during which the premium remains due and unpaid. During the month of grace this insurance bond remains in force, and the unpaid premium, with interest as above, remains an indebtedness to the company, which will be deducted from the amount payable under this bond if the death of the insured shall occur during the month.

27 4. REINSTATEMENT IN EVENT OF LAPSE

This insurance bond will be reinstated on written application therefor within six months after nonpayment of any premium, subject

to evidence of good health satisfactory to the company, and payment of premiums to date of reinstatement with interest at the rate of five per cent per annum.

5. CHANGE OF BENEFICIARY

The insured may at any time during the continuance of this insurance bond, provided the bond is not then assigned, change the beneficiary or beneficiaries by written notice to the company at the home office, accompanied by this bond, such change to take effect on the endorsement of the same on the bond by the company.

6. GENERAL REGULATIONS

No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying any premium, to waive any forfeiture, or to bind the company by making any promise, or making or receiving any representation or information. These powers can be exercised only by the president, vice president, second vice president, actuary, or secretary of the company, and will not be delegated.

All premiums are due and payable at the home office, unless otherwise agreed in writing, but may be paid to agent producing receipt signed by the president, vice president, second vice president, actuary, or secretary and countersigned by such agents. If any premium is not paid on or before the day when due, this insurance bond shall become void, and all payments previously made shall remain the property of the company except as hereinbefore provided.

Proofs of death must be furnished to the company at the home office within one year after the death of the insured, which proofs shall comprise satisfactory statements establishing the claim. Such statements must comply fully with the company's forms in use at the time of the death of the insured. If it is found that the age of the insured was incorrectly stated in the application on which this insurance bond was issued, the amount payable under this bond shall be such proportion of the amount of the bond as the premium paid bears to the required premium at the true age.

Any indebtedness to the company, including any balance of
28 the current year's premium remaining unpaid, will be deducted in any settlement of this insurance bond or of any benefit thereunder.

Any assignment of this insurance bond must be made in duplicate and both sent to the home office, one duplicate to be retained by the company and the other to be returned. The company has no responsibility for the validity of any assignment.

SPECIAL ADVANTAGES—TABLE OF AMOUNTS PAYABLE IN EVENT OF DEATH DURING THE ACCUMULATION PERIOD IF PREMIUMS ARE PAID IN FULL TO DATE OF DEATH

The amount payable to the insured in event of death prior to May 19th, 1919, as specified on the face of the bond, will be set forth in the following table:

| Year | Amount payable | Year | Amount payable |
|---|---|---|---|
| First to tenth inclusive | $50,000 | Sixteenth | $861,050 |
| Eleventh | $50,700 | Seventeenth | $904,150 |
| Twelfth | $52,700 | Eighteenth | $895,700 |
| Thirteenth | $54,800 | Nineteenth | $909,350 |
| Fourteenth | $57,000 | Twentieth | $872,150 |
| Fifteenth | $59,300 | | |

TABLE OF LOANS AND OF SURRENDER VALUES

In paid-up insurance or extended insurance, under the conditions specified on the next page.

29

| At end of— | Loans | Paid-up insurance | Surrender values (extended insurance for $50,000 for the term specified below, with cash, if then living) |
|---|---|---|---|
| 2nd year | 7,000 | $15,000 | 17 Years 0 months with $4,100 cash |
| 3rd " | 10,000 | 20,000 | 16 " 0 " " 11,700 " |
| 4th " | 13,000 | 25,000 | 15 " 0 " " 19,300 " |
| 5th " | 16,700 | 30,000 | 14 " 0 " " 26,250 " |
| 6th " | 20,100 | 35,000 | 13 " 0 " " 31,600 " |
| 7th " | 24,150 | 40,000 | 12 " 0 " " 36,300 " |
| 8th " | 28,600 | 45,000 | 11 " 0 " " 41,800 " |
| 9th " | 33,000 | | |
| 10th " | 37,700 | | |
| 11th " | 42,900 | | |
| 12th " | 47,900 | | |
| 13th " | 53,700 | | |
| 14th " | 59,200 | | |
| 15th " | 65,200 | | |
| 16th " | 71,600 | | |
| 17th " | 78,300 | | |
| 18th " | 85,400 | | |
| 19th " | 92,800 | | |
| 20th " | For special advantages at end of accumulation period, see accumulation benefits below. | | |

ACCUMULATION GUARANTEES

This insurance bond participates in surplus as hereinafter provided, but no dividend shall be apportioned to it before the end of the accumulation period. If the insured elects to continue this insurance bond beyond the accumulation period, under one of the two accumulation benefits first named below, no further dividend shall be apportioned to it before the end of each period of five years thereafter.

The accumulation period of this insurance bond ends on the nineteenth day of May in the year nineteen hundred and nineteen. If the insured is living, and if the premiums have been duly paid to that date and not otherwise,

The company will then apportion a dividend to the insured, who shall have the option of continuing, or discontinuing, this insurance bond under one of the following:

30 FOUR ACCUMULATION BENEFITS

(1) Receive an income of two thousand dollars and no cents per annum during life (being equal to four per cent on the initial amount of the insurance ($50,000), the payment to be made on the nineteenth day of May, nineteen hundred and twenty, and receive the dividend converted into a life annuity, payable with the income as above, and continue this insurance bond without further payment of premiums (evidence of good health will not be required); or,

(2) Receive the dividend in cash, and receive an income for life, payable as specified in the "first benefit," and continue this insurance bond without further payment of premiums (evidence of good health will not be required); or,

(3) Receive the entire cash value, as stated below, converted into an annual income during the life of the insured, payable as provided in the "first benefit," which income the company guarantees shall be not less than thirty-four hundred and seventy-four dollars and no cents, and discontinue this insurance bond; or,

(4) Receive the entire cash value, as stated below, in cash, and discontinue this insurance bond.

The company guarantees that the entire cash value of this insurance bond at the end of the accumulation period shall be fifty thousand dollars, and in addition the cash dividend then apportioned by the company.

At the end of the accumulation period the company will send the insured a written statement, setting forth the results under each of the above accumulation benefits, and if the insured shall fail at that time to notify the company which benefit has been selected, the first benefit will be considered selected.

State of Kentucky.
County of Jefferson, ss:

I, Mildred M. Spaulding, a notary public in and for the State and county aforesaid, do hereby certify that the foregoing is a full, true, and complete copy of insurance policy issued by the New York Life Insurance Company on the life of Alexander A. J. Alexander, No. 950778, dated the fifth day of June, 1899, as appears from a photostatic copy of the original of said policy in my possession.

31 In testimony whereof I have hereunto set my hand and affixed the seal of my office at the city of Louisville, Kentucky, this 24th day of December, 1924.

[SEAL.]

MILDRED M. SPALDING,
*Notary Public.*

My commission expires June 21, 1925.

In United States District Court

*Order re depositions*

April 11, 1925

On a hearing in open court, and good cause being shown, and by agreement of counsel, it is ordered that depositions be taken in conformity with the stipulation filed in this action.

In United States District Court

*Answer*

Filed October 30, 1925

Now comes defendant herein, Robert H. Lucas, collector of internal revenue for the district of Kentucky, and by leave of court first obtained files this his answer to plaintiff's amended petition herein, and answering Paragraph I thereof, denies that plaintiff's income-tax return for the calendar year 1919, filed before March 15, 1920, showed net income from farming in the sum of $22,469.09 or a greater sum than $22,269.09, or that said income-tax return showed a net income of $65,880.21 or a greater net income than the sum of $65,608.21; denies that there was added to the policies of insurance issued to plaintiff by the New York Life Insurance Company on May 19, 1899, annual accumulations from that date to the maturity date of said policies, May 19, 1919; denies that said policies were worth on March 1, 1913, the sum of $115,511.00, or any amount in excess of the sum of $78,100.00, the value of said policies as of March 1, 1913, found and determined by the Commissioner of Internal Revenue; and said defendant denies that said Commissioner of Internal Revenue was in error in valuing said policies as of March 1, 1913, at the sum of $78,100.00.

32

Answering Paragraph II of said plaintiff's amended petition, defendant denies that said sum of $5,200.00 paid to said plaintiff by Security Trust Company, of Lexington, Kentucky, and included by plaintiff in his taxable income for the year 1919 was a gift, and further denies that said sum was not a part of plaintiff's taxable income for said calendar year 1919.

Defendant denies that reasonable and fair depreciation for the calendar year 1919 on plaintiff's interest in said Ashland Block Association amounted to the sum of $3,333.33, or any sum greater than $1,666.66, and further denies that plaintiff's net income from rents for the calendar year 1919 was the sum of $25,319.01, or any sum less than $26,985.67.

Defendant denies that plaintiff's computation of his gross income and deductions for the calendar year 1919 set forth in said Paragraph II of said amended petition is true and correct; denies that

said plaintiff is entitled to deductions for repairs, wear, and tear in the sum of $4,084.61, or in any sum exceeding the sum of $2,417.95; denies that plaintiff's income from rents for the calendar year 1919 was the sum of $25,319.01, or any sum less than the sum of $26,985.67; denies that said plaintiff received as income in the calendar year 1919 on the surrender of his said policies of life insurance to said New York Life Insurance Company less than the sum of $42,697.00, and denies that said plaintiff received thereon as dividends on insurance policies only the sum of $5,286.00, or any sum less than $20,797.00; denies that said plaintiff received as net income from all sources for the calendar year 1919 less than the sum of $102,513.21, or a taxable net income of less than $86,630.54.

33 Defendant further denies that plaintiff's tax liability for the calendar year 1919 was the sum of $7,997.11, or any sum less than $22,149.70.

Defendant denies that said plaintiff ever paid to this defendant any additional taxes for the year 1919 under duress and/or protest; denies that said plaintiff paid to this defendant income taxes for the year 1919 in the sum of $11,334.17, or any sum in excess of the sum of $8,750.91, and said defendant denies that said sum of $8,750.91, or any part thereof was paid to him by plaintiff under protest, and/or under threats and duress by said defendant.

Defendant denies that said additional income taxes in the sum of $11,334.17 for the calendar year 1919 complained of in said amended petition and certified to this defendant for collection by the Commissioner of Internal Revenue were erroneously assessed against said plaintiff.

Defendant denies that he is indebted to said plaintiff in said sum of $11,334.17, with interest thereon from October 26, 1923, or in any sum whatever.

Wherefore, having answered, the defendant prays that the petition as amended be dismissed, and he prays for his costs herein expended, and for all general and proper relief.

ROBERT H. LUCAS,
*Collector of Internal Revenue for the Second District of Kentucky.*
By W. S. BALL,
*United States Attorney,*
*Attorney for Defendant.*

[*Duly sworn to by Robert H. Lucas; jurat omitted in printing.*]

34 In United States District Court

*Amended petition*

Filed April 14, 1926

Comes the plaintiff, A. J. A. Alexander, and by leave of court amends his petition and for amendment states:

That on or before March 15, 1920, he filed with the collector of internal revenue at Louisville, Kentucky, his income-tax return for

the year 1919, and on February 28, 1920, he paid to the collector of internal revenue for the district of Kentucky three thousand two hundred and eighty-three dollars and eighty-eight ($3,283.88) cents, and a like amount on June 14, September 15, and December 14, 1920, the total of which was the amount of tax shown to be due on his original return.

Plaintiff says that on October ———, 1923, the Commissioner of Internal Revenue assessed additional taxes against him for the year 1919 in the sum of eleven thousand three hundred and thirty-four dollars and seventeen ($11,334.17) cents and certified same to the defendant, Robert H. Lucas, collector of internal revenue for the district of Kentucky for collection, and that said Lucas immediately demanded payment thereof, and in his demand threatened to assess penalties and interest on the tax thus assessed unless paid.

Plaintiff says that on November 2, 1923, in order to avoid the imposition of penalties and a seizure of his property, by the defendant, he paid to the defendant under protest the sum of eight thousand and thirteen dollars and fifty-four ($8,013.54) cents, and on December 5, 1923, under the same circumstances and for the same reasons, he paid to the defendant, Robert H. Lucas, collector of internal revenue for the district of Kentucky, seven hundred and thirty-seven dollars and thirty-seven ($737.37) cents.

Plaintiff says that after the above payments were made, there was outstanding against him on the assessment list in the office of collector of internal revenue for the district of Kentucky two thousand five hundred and eighty-three dollars and twenty-six ($2,583.26) cents, and on December 5, 1923, he filed with the defendant, Robert H. Lucas, collector of internal revenue for the district of Kentucky, a claim for credit against the balance so outstanding for income taxes overpaid in the year 1918 in the sum of one thousand and seventy-two dollars and forty-one ($1,072.41) cents; 1920, four hundred and thirty-four dollars and ninety-seven ($434.97) cents; 1921, four hundred and twenty-four dollars and twenty-one (424.21) cents; 1922, six hundred and fifty-one dollars and sixty-seven
35 ($651.67) cents, a total for all years of two thousand five hundred and eighty-three dollars and twenty-six ($2,583.26) cents.

Plaintiff says that the defendant, Robert H. Lucas, collector of internal revenue for the district of Kentucky, forwarded said claim for credit to the Commissioner of Internal Revenue, Washington, D. C., and that said commissioner has ever since said time had said claim under consideration, but has neither approved or rejected it.

Plaintiff says that on the 2 day of November, 1923, he filed with the collector of internal revenue for the district of Kentucky a claim for refund in the sum of twelve thousand four hundred and forty one dollars and sixty ($12,441.60) cents, said claim including eight thousand seven hundred and fifty dollars and ninety one ($8,750.91) cents, which was paid to the defendant, Robert H. Lucas, collector of internal revenue under protest as hereinbefore stated.

Plaintiff says that said claim was forwarded by the defendant to the Commissioner of Internal Revenue, Washington, D. C., and that the said commissioner has had said claim under consideration from the ——— day of December, 1923, to the present time and has neither approved or rejected it.

Plaintiff says that no part of the eight thousand seven hundred and fifty dollars and ninety one ($8,750.91) cents paid by him to the defendant, Robert H. Lucas, collector of internal revenue for the district of Kentucky, was due or owing by him to the United States for income taxes for the year 1919, and all of said sum is now due and owing to him with six per cent interest thereon from December 5, 1923, until paid.

Wherefore plaintiff prays, as in his original petition, for his cost and all proper relief.

ELWOOD HAMILTON,
*Attorney for Plaintiff.*

36 In United States District Court

*Amended answer*

Filed April 16, 1926

Now comes defendant herein, by W. Sherman Ball, United States attorny for the western district of Kentucky, his attorney, and for answer to plaintiff's amended petition filed April 14, 1926, denies that said plaintiff on the 5th day of December, 1923, or at any time, filed with the collector of internal revenue for the district of Kentucky claim for refund in the sum of $12,441.60 or for any other sum; denies that said claim was forwarded by the defendant to the Commissioner of Internal Revenue, Washington, D. C., or that said commissioner has had said claim under consideration or that he has neither approved nor rejected it.

Defendant denies that no part of the sum of $8,750.91 paid by plaintiff to defendant was due or owing by plaintiff to the United States for income taxes for the year 1918, and further denies that said sum of $8,750.91 or any other sum whatever is now due or owing to said plaintiff.

Wherefore, having answered, defendant prays that plaintiff's amended petition herein be dismissed, and further prays for its costs herein expended and for all general and proper relief.

THE UNITED STATES OF AMERICA,
By W. S. BALL,
*United States Attorney,*
*Attorney for Defendant.*

[*Duly sworn to by W. S. Ball; jurat omitted in printing.*]

37 In United States District Court

*General demurrer*

Filed April 16, 1926

Now comes the defendant herein and demurs to plaintiff's amended petition filed herein on the grounds that said amended petition does not state facts sufficient to constitute a cause of action against this defendant.

W. S. Ball,
*United States Attorney,*
*Attorney for Defendant.*
E. H. Horton,
*Special Attorney, Bureau of Internal Revenue,*
*Of Counsel.*

In United States District Court

*Opinion*

This is a suit to recover income taxes for the year 1919, exacted for the plaintiff under the deficiency assessment, and paid by him under protest. A jury was waived, separate findings of facts and conclusions of law requested, and the case submitted on an agreed statement of facts and certain depositions. The record, as finally made up, presents the single question of what taxable gain, if any, was realized by the plaintiff in 1919, upon the cashing in by him of two insurance policies issued to him as of May 19, 1899.

These policies were issued by the New York Life Insurance Company and were each for the sum of $50,000.00. They were what are known as participating deferred dividend policies, and by their terms were to be fully paid up upon the payment of ten annual premiums each for the sum of $3,905.00, with a twenty-year accumulation period. The premiums on the two policies total $78,100.00, and the payments thereon were completed on March 19, 1908. The twenty-year accumulation period ended on the 19th day of May, 1919. The plaintiff was twenty-four years old at the time these policies
28 were issued. In the event of the death of the insured the policies were payable to his estate. They were exactly alike, and they provided that if the plaintiff should be living at the end of the accumulation period, he might exercise either of four enumerated options. The policies in this respect provide as follows:

"This insurance bond participates in surplus as hereinafter provided, but no dividend shall be apportioned to it before the end of the accumulation period. If the insured elects to continue this insurance bond beyond the accumulation period, under one of the two accumulation benefits first named below, no further dividend shall be apportioned to it before the end of each period of five years thereafter.

"The accumulation period of this insurance bond ends on the nineteenth day of May in the year nineteen hundred and nineteen. If the insured is living, and if the premiums have been duly paid to that date and not otherwise.

"The company will then apportion a dividend to the insured, who shall have the option of continuing or discontinuing this insurance under one of the following four accumulation benefits:

"(1) Receive an income of two thousand dollars and no cents per annum during life (being equal to four per cent on the initial amount of the insurance ($50,000), the first payment to be made on the nineteenth day of May, nineteen hundred and twenty, and receive the dividend converted into a life annuity, payable with the income as above, and continue this insurance bond without further payment of premiums (evidence of good health will not be required); or,

"(2) Receive the dividend in cash and receive an income for life payable as specified in the 'first benefit' and continue this insurance bond without further payment of premiums (evidence of good health will not be required); or,

"(3) Receive the entire cash value, as stated below, converted into an annual income during the life of the insured, payable as provided in the 'first benefit,' which income the company guarantees shall be not less than thirty-four hundred and seventy-four dollars and no cents, and discontinue this insurance bond; or,

39 "(4) Receive the entire cash value as stated below, in cash, and discontinue this insurance bond.

"The company guarantees that the entire cash value of this insurance bond at the end of the accumulation period shall be fifty thousand dollars, and in addition the cash dividend then apportioned by the company.

"At the end of the accumulation period the company will send the insurance a written statement, setting forth the results under each of the above accumulation benefits, and if the insured shall fail at that time to notify the company which benefit has been selected, the first benefit shall be considered selected."

Each policy also provided that if the insured died at any time before the end of the tenth year after its issue the beneficiary would be paid the sum of $50,000.00 in full satisfaction thereof. Each policy also contained a schedule of the amounts payable in event of death at any time between the end of the tenth year and prior to May 19, 1919, as follows:

| | |
|---|---|
| 11th year | $50,700 |
| 12th " | 52,700 |
| 13th " | 54,800 |
| 14th " | 57,000 |
| 15th " | 59,300 |
| 16th " | 61,650 |
| 17th " | 64,150 |
| 18th " | 66,700 |
| 19th " | 69,350 |
| 20th " | 72,150 |

Each policy also contained provisions with reference to paid-up and extended insurance, as well as a schedule of loan values. The loan-value schedule begins at the end of the third year, and is as follows:

| | | |
|---|---|---|
| 3rd | year | $7,900 |
| 4th | " | 10,000 |
| 5th | " | 13,500 |
| 6th | " | 16,750 |
| 7th | " | 20,350 |
| 8th | " | 24,350 |
| 9th | " | 28,000 |
| 10th | " | 30,000 |
| 11th | year | 32,700 |
| 12th | " | 34,900 |
| 13th | " | 37,300 |
| 14th | year | 39,700 |
| 15th | " | 42,250 |
| 16th | " | 44,950 |
| 17th | " | 46,500 |
| 18th | " | 48,100 |
| 19th | " | 49,900 |

The policies contained no cash surrender value schedule, but it is admitted that the loan value schedule had the same effect as a cash surrender value, because the insured could borrow the scheduled loan value, and if he did not desire to repay it he could surrender the policy and would owe the insurance company nothing.

Subsequent to May 19, 1919, the end of the accumulation period, plaintiff elected to exercise the fourth option heretofore set out, and upon such election the insurance company paid to him on each of the policies $50,000.00 as the face thereof and $10,398.50 as accumulations, or a total on the two policies of $120,797.00.

The Commissioner of Internal Revenue found that under section 213 of the revenue act of 1918 (act of February 24, 1919) and under article 72 (b) of regulation 45 (1920 edition) of the Treasury Department the taxable gain realized by the plaintiff should be determined by deducting from the sum of $120,797.00 the sum of $78,100.00, representing the return, without interest, of the premiums actually paid by the plaintiff on these policies. The plaintiff contends that the only taxable gain realized by him on the transaction was the difference between the sum of $120,797.00, the amount received by him upon surrender of his policies in 1919, and the fair value of these policies as of March 1, 1913.

The pertinent part of section 213 of the revenue act of 1918 declares that the term gross income—

"(b) * * * does not include the following items, which shall be exempt from taxation under this title. * * *

"2. The amount received by the insured as a return of premium or premiums paid by him under life insurance, endowment, or annuity contracts, either during the term or at the maturity of the term mentioned in the contract, or upon surrender of the contract."

Article 72 (b) of regulation 45 (1920 edition) provides:

41 "During his life only so much of the amount received by an insured under life, endowment, or annuity contracts as

represents a return without interest of premiums paid by him therefor is excluded from his gross income."

Whatever value these policies had on March 1, 1913, must be taken into consideration in determining what taxable gain was realized by the plaintiff upon their surrender in 1919. Their value on March 1, 1913, constituted invested capital, no part of which could be converted into income for taxation purposes in 1919, either by act of Congress or by department regulation. If, as a matter of fact, these policies on March 1, 1913, had an actual value in excess of the premiums which had been paid, this value, rather than the premiums paid, must be deducted from the sum received in 1919 in order to determine taxable gain.

The defendant advances the suggestion that if the actual value of the policies as of March 1, 1913, is to be employed as the basis for determining the taxable gain realized upon surrender of the policies in 1919, then the only value which can be assigned to them as of March 1, 1913, would be their loan value or cash surrender value as of that date, shown by the schedule set out in the policies to be $37,300.00 each, or a total of $74,600.00. This contention is based upon the provision of the policies, unless he lived out the twenty-year accumulation period, which had not expired on March 1, 1913; that under the terms of the policies the insurance company was not required to, and as a matter of fact had not, prior to the end of the accumulation period, irrevocably set aside to these policies any part of the accumulations which would ultimately go to them if the insured lived out the accumulation period; that therefore, inasmuch as the plaintiff could not sell his policies and had no right to them, the only demonstrable provisionally allotted to them, the only demonstrable value these policies had on March 1, 1913, was the scheduled loan value or surrender value thereof, which on that date was $37,300.00 each, or a total of $74,600.00.

It is true that the insurance company had not finally set aside to these policies any part of the accumulations which would ultimately belong to them if the plaintiff lived out the accumulation period, nor did the plaintiff on that date have any present title to such accumulations. The record shows, however, that the company had year by year provisionally ascertained the amount
42 of accumulations attributable to each of these policies, and the amount thus provisionally ascertained and set aside on March 1, 1913, was $6,800.00, or $13,600.00 for the two policies. The record also shows that it was known that the rate of accumulation during the last few years of the accumulation period would be greater than the earlier years prior to 1913.

Of course, under the terms of the policies, if the plaintiff had elected to surrender his policies in 1913 and claim his rights thereunder, he would have gotten no part of the accumulations, but I can not accede to the contention that this fact fixed the value of the plaintiff's two contracts as of that date, either at their loan value

or at the amount of the premiums which had been paid. The premiums had already been paid. There was no possibility of the policies lapsing for nonpayment of premiums. At the time they were issued the record shows that the plaintiff was a young man twenty-four years of age. In 1913 he was thirty-eight years of age. The record fails to show that he had other than the average expectancy of life. According to the mortality table in common use in Kentucky his expectation of life on March 1, 1913, was 26.91 years. In determining the value of his policies on March 1, 1913, it would not have been unreasonable for the plaintiff to have anticipated that he would live out the accumulation period, which had only six years two months and eighteen days to run, and would thereby receive the special property rights in the contracts inuring to him at the end of the accumulation period. He could have ascertained that there had already been assigned to those two policies, provisionally, $13,600.00. He could have ascertained that the rate of accumulation for the remainder of the accumulation period would have been equal to, if not in excess of, what it had been in the past. If it had maintained the same ratio, however, for the last six years of the accumulation period which it had maintained for the first fourteen, he could reasonably have anticipated that the $13,600.00 provisionally set aside to the policies in 1913 would have grown to $19,428.57 at the end of the accumulation period on May 19, 1919.

An examination of the schedule of loan values demonstrates that on May 19, 1913, he could have collected as a loan or cash surrender value on each of these policies $39,700.00, or a total of $79,400.00. Of course the plaintiff knew this on March 1, 1913. On that date he knew that if he lived until the end of the year beginning May 19, 1914, he could have collected as cash surrender
43 value on each of these policies $42,250.00, or a total of $84,500.00, and that if he were living at the end of each subsequent policy year, his rights under the loan schedule were rapidly increasing in value. He also would collect $57,000.00 on each of these policies, with a rapidly mounting scale of death values, should death occur in subsequent years and prior to May 19, 1919.

In view of these manifest benefits conferred by the policies, how can it be rationally contended that the only value of these insurance contracts on March 1, 1913, was the sum of the premiums paid, without interest, or the loan values assigned to them on that date? To reach any such conclusion would be to disregard the facts. It is, of course, true that on March 1, 1913, it was not certainly known that the plaintiff would live out the accumulation period. Yet this same character of uncertainty is encountered by the courts constantly in determining the value of life estates in property, particularly in the allotment of dower. It is true that there is no method by which the value of these policies can be ascertained with mathematical exactness as of March 1, 1913, but the plaintiff should not be made to bear the entire burden of this condition when their value as of that date can be

fairly approximated, and when it is clear that by the application of any fair standard of value they were worth in excess of the sum claimed by the Government.

Under all the circumstances, I think it is fair to both the Government and the plaintiff to fix the value of what the plaintiff could at that date have reasonably anticipated they would have been worth on the 19th day of May, 1919, under the fourth option heretofore referred to, arriving at the then present value by the application of a four per cent interest rate, compounded annually. As I have heretofore indicated, I think the plaintiff on March 1, 1913, could reasonably have anticipated that at the end of the accumulation period he would receive at least $19,428.57 of accumulations, and in addition thereto the face value of the policies, or a total of $119,428.57. The present value of this sum on March 1, 1913, at four per cent interest, compounded annually, would be $93,587.81. This amount, I think, should be treated as the fair value of the plaintiff's two policy contracts on March 1, 1913. Deducting this sum from $120,797.00, the amount actually received by the plaintiff upon surrender of his policies at the end of the accumulation period would result in a taxable gain of $27,209.19. Of this sum $20,797.00 was paid out of earned surplus, and is, therefore, taxable as dividends, which $6,412.19 thereof would be subject to both normal and surtax.

Counsel for plaintiff will prepare a judgment conforming to the views herein expressed, with a finding of facts as herein indicated and as more fully stipulated in the record, and present same for entry.

CHAS. I. DAWSON, *Judge.*

MARCH 9, 1927.

ELWOOD HAMILTON,
BECKHAM, HAMILTON & BECKHAM,
*Attorneys for plaintiff.*
W. SHERMAN BALL, *U. S. District Attorney.*
A. E. GEBBS, *Gen'l Counsel Bureau of Internal Revenue,*
EDWARD H. HORTON, *Atty. Bureau of Internal Revenue,*
*Attorneys for Defendant.*

In United States District Court

*Judgment and findings of fact*

March 9, 1927

This cause coming on to be heard and the law and facts being submitted to the court, a jury being expressly waived by the parties, the court finds, adjudges, and decrees that the plaintiff recover of the defendant, Robert H. Lucas, collector of internal revenue for the district of Kentucky, six thousand five hundred nineteen dollars and thirty-six (86,519.36) cents, with six per cent interest thereon from

December 2, 1923, until the date of the entry of this judgment, and his costs in this action expended, for all of which he may have execution.

It is further adjudged and decreed by the court that there was reasonable cause for the collection of the above sum from the plaintiff by the defendant and that he shall not be personally responsible therefor.

45 In determining the above judgment the court finds the following facts to be true:

First. Plaintiff is a citizen of Kentucky and resides at Spring Station, in the eastern district of Kentucky.

Second. Defendant is a resident of Louisville, Kentucky, and since the 24th day of May, 1921, has been the duly appointed, acting, and qualified collector of internal revenue for the district of Kentucky.

Third. Plaintiff, before March 15, 1920, duly filed with the then collector of internal revenue for the district of Kentucky his income-tax return for the calendar year 1919 and showed thereon, among things as income, dividends on insurance policies in the sum of $17,290.35 and a total net income of $65,690.21, and thereafter duly paid voluntarily and without protest to the then collector of internal revenue taxes assessed thereon in the sum of $13,135.52.

Fourth. Plaintiff on the 5th day of June, 1899, upon his application, was granted by the New York Life Insurance Company of New York City, New York, effective May 19, 1899, two policies of life insurance, each in the sum of $50,000.00 and each on the face thereof described as "insurance bond with guaranteed interest." Plaintiff agreed to pay on each policy in advance premiums at the rate of $3,905.00 per annum for a period of ten years, and his premium payments on said policies in the total sum of $78,100.00 were completed on March 19th, 1908.

Said New York Life Insurance Company is a mutual life insurance company doing business on the mutual-level premium plan.

Fifth. Each of said policies contained the following provisions as to deferred dividends and surplus:

"ACCUMULATION GUARANTEED

"This insurance bond participates in surplus as hereinafter provided, but no dividend shall be apportioned to it before the end of the accumulation period. If the insured elects to continue this insurance bond beyond the accumulation period under one of the two accumulation benefits first named below, no further dividend shall be apportioned to it before the end of each period of five years thereafter.

"The accumulation period of this insurance bond ends on the nineteenth day of May in the year nineteen hundred and nineteen.

If the insured is living and if the premiums have been duly paid
46 to that date, and not otherwise, the company will then apportion a dividend to the insured, who shall have the option of

continuing or discontinuing this insurance bond under one of the following four accumulation benefits:

"(1) Receive an income of two thousand dollars and ——— cents per annum during life (being equal to four per cent on the initial amount of the insurance, $50,000), the first payment to be made on the nineteenth day of May, nineteen hundred and twenty, and receive the dividend converted into a life annuity, payable with the income as above, and continue this insurance bond without further payment of premiums (evidence of good health will not be required); or,

"(2) Receive the dividend, in cash, and receive an income for life, payable as specified in the 'first benefit,' and continue this insurance bond without further payment of premiums (evidence of good health will not be required); or,

"(3) Receive the entire cash value, as stated below, converted into an annual income during the life of the insured, payable as provided in the 'first benefit,' which income the company guarantees shall be not less than thirty-four hundred and seventy-four dollars and ——— cents, and discontinue this insurance bond; or,

"(4) Receive the entire cash value, as stated below, in cash, and discontinue this insurance bond.

"The company guarantees that the entire cash value of this insurance bond at the end of the accumulation period shall be fifty thousand dollars, and in addition the cash dividend then apportioned by the company.

"At the end of the accumulation period the company will send the insured a written statement, setting forth the results under each of the above accumulation benefits, and if the insured shall fail at that time to notify the company which benefit has been selected, the first benefit shall be considered selected."

Sixth. Each of said policies matured on the 19th days of May, 1919, and plaintiff elected to receive from the company, in
47 accordance with the provisions of said option #4, the cash surrender value thereof, to wit, $120,797.00, and subsequently said company on the surrender to it of said policies of insurance paid to said plaintiff in the calendar year 1919 cash to the amount of said $120,797.00.

Seventh. On reaudit of plaintiff's income-tax return for said calendar year 1919 the Commissioner of Internal Revenue determined and found the amount of income realized by plaintiff on the surrender of his said policies to be the sum of $42,697.00, or the difference between the cash surrender value thereof, $120,797.00, and the total premiums paid by plaintiff, $78,100.00, and after making certain adjustments not material here duly assessed an additional tax for said calendar year 1919 of $11,334.17 against said plaintiff.

Eighth. Plaintiff, prior to bringing this action against defendant on May 27th, had not paid the amount of said additional taxes assessed against him by said Commissioner of Internal Revenue, but had paid to said defendant only a portion thereof, to wit, the sum of $8,750.91, as follows:

On November 2nd, 1923, plaintiff paid to defendant the sum of $8,013.54 under written protest and later, on December 5th, 1923, the further sum of $737.37, making a total payment by said plaintiff to said defendant of said sum of $8,750.91, and no more, on said additional assessment of $11,334.17.

Ninth. Plaintiff, on December 5th, 1923, filed with defendant certain claims for credit for alleged overpayment of income taxes for the calendar years 1918, 1920, 1921, and 1922 in the sums of $1,072.41, $434.97, $424.21, and $651.67, respectively, claiming total credits on account thereof in the sum of $2,583.26 as against said additional assessment of $11,334.17 for said calendar year 1919, and that said credit claims were duly transmitted to the collector of internal revenue, but no action thereon has been as yet taken by said Commissioner of Internal Revenue.

Tenth. Subsequent to the assessment of said additional tax of $11,334.17 against said plaintiff by said Commissioner of Internal Revenue, said plaintiff filed with this defendant a purported claim in abatement and claim for refund in the sums of $3,320.63 and $4,894.39, respectively, to which was attached an amended return executed by said plaintiff for said calendar year 1919, which showed, among other things, "income from insurance policy" of
48 $21,900.00, a total net taxable income of $70,621.39, and a total tax, according to plaintiff's computation, of $16,132.20.

Eleventh. Said purported claim for abatement and claim for refund was not transmitted by the defendant to the Commissioner of Internal Revenue at Wa... ...ton, D. C., but said defendant notified said plaintiff by letter dated October 31st, 1923, as follows:

OCTOBER 31, 1923.

JJB/ES
IT-2
Mr. A. J. A. ALEXANDER,
*Care Beckham, Hamilton & Beckham,*
*Inter-Southern Building, Louisville, Kentucky.*

SIR: This office is in receipt of your letter of the 26th instant enclosing check for $8,013.54 to apply on assessment of additional income tax for the year 1919; also a claim in abatement for $3,320.63 covering the remainder of the assessment.

I regret to advise that this additional assessment is made by the Commissioner of Internal Revenue in accordance with section 250 (d) of the revenue act of 1921, which prohibits the collection from accepting a claim in abatement. It is therefore necessary to ask that payment of the full amount of $11,334.17 be made, and after the full payment is received the claim will be allowed to operate as a refund claim. Under the law there is no other course for this office to pursue, and I trust that you will forward remittance for $3,320.63 by return mail.

Respectfully,

ROBT. H. LUCAS, *Collector.*
*By Chief, Income Tax Division.*

Twelfth. After plaintiff filed said credit claims for said years 1918, 1920, 1921, and 1922, referred to in paragraph ninth hereof, plaintiff, on March 13th, 1924, filed with this defendant's claim for refund in the sum of $18,755.87, which defendant duly transmitted to the Commissioner of Internal Revenue at Washington, D. C., but said Commissioner of Internal Revenue had taken no action thereon on or prior to May 27th, 1924.

Thirteenth. Said plaintiff, in filing his original return for said calendar year 1919, had failed to claim a deduction for depre-
49 ciation on certain real estate in which he had an interest in the city of Chicago; and said Commissioner of Internal Revenue, on consideration of plaintiff's claim for refund of March 13th, 1924, allowed a portion of the depreciation, and on October ——, 1925, on account thereof, duly issued to said plaintiff a certificate of overassessment for said calendar year 1919 in the sum of $2,319.99.

Fourteenth: That the correct income of the plaintiff for the year 1919 is as follows:

| | | | |
|---|---|---|---|
| Gross income: | | | |
| Income from farming | | | $61,216.48 |
| Deductions: | | | |
| Labor | | $7,195.42 | |
| Material supplies | | 12,154.87 | |
| Merchandise bought for resale | | 32,972.40 | |
| General expense | | 2,075.75 | |
| Inventory beginning of year | | 36,980.00 | |
| | | 91,378.44 | |
| Less inventory at end of year | | 59,365.00 | |
| | | 32,013.44 | |
| Other deductions: | | | |
| Salaries | | 3,612.78 | |
| Rent | | 24.00 | |
| Interest | | 780.67 | |
| Taxes | | 1,830.00 | |
| Repairs | | 656.50 | |
| | | | 38,917.39 |
| | | | 22,299.09 |
| Other income: | | | |
| Salaries | | | 2,000.00 |
| Income from rent | | 45,842.51 | |
| Deductions: | | | |
| Repairs, wear and tear | $2,417.86 | | |
| Interest | 4,583.33 | | |
| Taxes | 4,543.15 | | |
| Other expenses | 7,312.41 | | |
| | | 18,856.84 | |
| Income from rents | | | 26,985.67 |
| Trust income | | | 5,200.00 |
| Income from insurance policies | | | 6,412.19 |
| Dividends on insurance policies | | | 20,797.60 |
| Interest on bonds, foreign country | | | 163.79 |
| Ordinary dividends | | | 4,337.11 |
| | | | 88,184.85 |

| | | |
|---|---|---|
| Other deductions: | | |
| Interest | 1,005.00 | |
| Taxes paid | 237.67 | |
| Contributions | 13,029.32 | |
| | | 14,331.99 |
| | | 73,832.86 |

Fifteenth: That the income tax to be determined on the above income is as follows:

| | | |
|---|---|---|
| Net income: | | |
| Deductions | 73,832.86 | |
| Dividends | 25,134.11 | |
| Exemption | 1,400.00 | |
| | 26,534.11 | |
| | 47,298.75 | |
| Taxable at 4% | 4,000.00 | 160.00 |
| Taxable at 8% | 43,289.75 | 3,463.18 |
| Surtax | | 11,743.17 |
| Total tax | | 15,367.07 |

Sixteenth: That the plaintiff paid to the collector of internal revenue on income shown on his original return, taxes in the following amounts:

| | | |
|---|---|---|
| Feb. 28, 1920 | 3,283.88 | |
| June 14, 1920 | 3,283.88 | |
| Sept. 15, 1920 | 3,283.88 | |
| Dec. 4, 1920 | 3,283.88 | |
| | | $13,135.52 |

Seventeenth: That the plaintiff paid to the Collector of Internal Revenue on an additional assessment of taxes for 1919 in the amount of $11,334.17 the following amounts:

| | | |
|---|---|---|
| Nov. 2, 1923 | 8,013.54 | |
| Dec. 5, 1923 | 737.37 | |
| | | $8,750.91 |

Eighteenth: That the defendant, Robert H. Lucas, collector
51 of internal revenue for the district of Kentucky, erroneously collected on Nov. 2, 1923, but with probable cause, $6,519.36, from the plaintiff, income taxes for the calendar year 1919.

Nineteenth: That the court finds the March 1, 1913, value of the two insurance policies to be $93,587.81, which sum deducted from the amount received by the plaintiff on the surrender of the policy, to wit, $127,797.00, leaves a taxable gain of $27,209.19. Of this sum, $20,797.00 was paid out of earned surplus, and therefore taxable as dividends, and the balance of $6,412.19 subject to both normal and surtax.

Twentieth: The defendant objects and excepts to the judgment herein and so much of the findings of fact as determine the value of the insurance policies March 1, 1913, to be $93,587.81.

In United States District Court

*Order extending time for filing bill of exceptions*

Entered March 9, 1927

On application of the defendant, it is ordered that he be, and is hereby, given until the 2nd day of May, 1927, within which to prepare and present for settlement and approval his bill of exceptions in this case, including the evidence in narrative form.

In United States District Court

*Order filing bill of exceptions*

April 30, 1927

This day the defendant, by counsel, tendered in open court his bill of exceptions herein, including the evidence in narrative form, with the approval of counsel for the plaintiff endorsed thereon, and the court having examined same, it is approved, ordered filed, and made a part of the record for the purpose of appeal.

In United States District Court

*Bill of exceptions*

Filed April 30, 1927

Be it remembered that on the trial of this cause in this court at the regular October term (1926), judgment rendered March 9th, 1927, of said court, the honorable Charlie I. Dawson, judge, presiding, when the following proceedings were had, to wit, a jury was waived by stipulation, which is in words and figures, as follows:

*Waiver of jury trial and stipulation of facts*

Filed April 16, 1926

Now comes plaintiff and defendant and thereupon it is stipulated and agreed that trial by jury be waived in the above-entitled action and that the issues of fact and of law may be heard, tried, and determined by the court, and it is requested that the court make special findings of fact and its conclusions of law thereon separately stated.

(And thereupon, the plaintiff, to sustain the issue upon his part, offered testimony as follows: A stipulation of facts agreed upon by attorneys for both plaintiff and defendant, which is in words and figures as follows:)

It is further stipulated and agreed that the following facts are true and may be found as facts in the case.

First: Plaintiff is a citizen of Kentucky and resides at Spring Station in the eastern district of Kentucky.

Second: Defendant is a resident of Louisville, Kentucky, and since the 24th day of May, 1921, has been the duly appointed, acting, and qualified collector of internal revenue for the district of Kentucky.

Third: Plaintiff, before March 15th, 1920, duly filed with the then collector of internal revenue for the district of Kentucky his income tax return for the calendar year 1919 and showed thereon, among things as income, dividends on insurance policies in the sum of $17,290.35 and a total net income of $65,690.21, and thereafter duly paid voluntarily and without protest to the then collector of internal revenue taxes assessed thereon in the sum of $13,135.52.

Fourth: Plaintiff on the 5th day of June, 1899, upon his application was granted by the New York Life Insurance Company, of New York City, New York, effective May 19, 1899, two policies of life insurance, each in the sum of $50,000.00 and each on the face thereof described as "insurance bond with guaranteed interest." Plaintiff agreed to pay on each policy in advance premiums at the rate of $3,905.00 per annum for a period of ten years and his premium payments on said policies in the total sum of $78,100.00 were completed on March 19th, 1908.

Said New York Life Insurance Company is a mutual life insurance company doing business on the mutual level premium plan.

Fifth: Each of said policies contained the following provisions as to deferred dividends and surplus:

"ACCUMULATION GUARANTEES

"This insurance bond participates in surplus as hereinafter provided, but no dividend shall be apportioned to it before the end of the accumulation period. If the insured elects to continue this insurance bond beyond the accumulation period, under one of
54 the two accumulation benefits first named below, no further dividend shall be apportioned to it before the end of each period of five years thereafter.

"The accumulation period of this insurance bond ends on the nineteenth day of May in the year nineteen hundred and nineteen. If the insured is living, and if the premiums have been duly paid to that date, and not otherwise, the company will then apportion a dividend to the insured, who shall have the option of continuing or discontinuing this insurance bond under one of the following four accumulation benefits:

"(1) Receive an income of two thousand dollars and ——— cents per annum, during life (being equal to four per cent on the initial amount of the insurance ($85,000), the first payment to be made on the nineteenth day of May, nineteen hundred and twenty, and receiv

the dividend converted into a life annuity, payable with the income as above, and continue this insurance bond without further payment of premiums (evidence of good health will not be required); or,

"(2) Receive the dividend in cash and receive an income for life, payable as specified in the 'first benefit,' and continue this insurance bond without further payment of premiums (evidence of good health will not be required); or,

"(3) Receive the entire cash value, as stated below, converted into an annual income during the life of the insured, payable as provided in the 'first benefit,' which income the company guarantees shall be not less than thirty-four hundred and seventy-four dollars and ——— cents, and discontinue this insurance bond; or,

"(4) Receive the entire cash value, as stated below in cash, and discontinue this insurance bond.

"The company guarantees that the entire cash value of this insurance bond at the end of the accumulation period shall be fifty thousand dollars, and in addition the cash dividend then apportioned by the company.

"At the end of the accumulation period the company will send the insured a written statement, setting forth the results under each of the above accumulation benefits, and if the insured shall fail at that time to notify the company which benefit has been selected, the first benefit shall be considered selected."

Sixth: Each of said policies matured on the 19th day of May, 1919, and plaintiff elected to receive from the company, in accordance with the provisions of said option #4, the cash surrender value thereof, to wit, $120,797.00, and subsequently said company on the surrender to it of said policies of insurance paid to said plantiff in the calendar year 1919 cash to the amount of said $120,797.00.

Seventh: On reaudit of plaintiff's income-tax return for said calendar year 1919, the Commissioner of Internal Revenue determined and found the amount of income realized by plaintiff on the surrender of his said policies to be the sum of $42,697.00, or the difference between the cash surrender value thereof, $120,797.00, and the total premiums paid by plaintiff, $78,100.00, and after making certain adjustments not material here, duly assessed an additional tax for said calendar year 1919 of $11,334.17 against said plaintiff.

Eighth: Plaintiff, prior to bringing this action against defendant on May 27th, 1924, had not paid the amount of said additional taxes assessed against him by said Commissioner of Internal Revenue, but had paid to said defendant only a portion thereof, to wit, the sum of $8,750.91, as follows:

On November 2nd, 1923, plaintiff paid to defendant the sum of $8,013.54 under written protest, and later, on December 5th, 1923, the further sum of $737.37, making a total payment by said plaintiff to said defendant of said sum of $8,750.91, and no more, on said additional assessment of $11,334.17.

Ninth: Plaintiff on December 5th, 1923, filed with defendant certain claims for credit for alleged overpayments of income taxes for the calendar years 1918, 1920, 1921, and 1922, in the sums of $1,072.41, $434.97, $424.21, and $651.67, respectively, claiming total credits on account thereof in the sum of $2,583.26 as against said additional assessment of $11,334.17 for said calendar year 1919, and that said credit claims were duly transmitted to the collector of internal revenue, but no action thereon has been as yet taken thereon by said Commissioner of Internal Revenue.

Tenth: Subsequent to the assessment of said additional tax of $11,334.17 against said plaintiff by said Commissioner of In-
56 ternal Revenue, said plaintiff filed with this defendant a purported claim in abatement and claim for refund in the sums of $3,320.63 and $4,894.39, respectively, to which was attached an amended return executed by said plaintiff for said calendar year 1919 which showed, among other things, "Income from insurance policy" of $21,900.00, a total net taxable income of $70,621.39, and a total tax according to plaintiff's computation of $16,132.20.

Eleventh: Said purported claim for abatement and claim for refund was not transmitted by the defendant to the Commissioner of Internal Revenue at Washington, D. C., but said defendant notified said plaintiff by letter dated October 31st, 1923, as follows:

OCTOBER 31, 1923.

JJB/ES
IT-2
Mr. A. J. A. ALEXANDER,
*Care of Beckham, Hamilton & Beckham,*
*Inter-Southern Building, Louisville, Kentucky.*

SIR: This office is in receipt of your letter of the 26th instant, enclosing check for $8,013.54 to apply on assessment of additional income tax for the year 1919; also a claim in abatement for $3,320.63 covering the remainder of the assessment.

I regret to advise that this additional assessment is made by the Commissioner of Internal Revenue in accordance with section 240 (d) of the revenue act of 1921, which prohibits the collector from accepting a claim in abatement. It is, therefore, necessary to ask that payment of the full amount, $11,334.17, be made, and after the full payment is received the claim will be allowed to operate as a refund for this office to pursue, and I trust that you will forward remittance for $3,320.63 by return mail.

Respectfully,

ROBT. H. LUCAS, *Collector.*
By CHIEF, *Income Tax Division.*

Twelfth: After plaintiff filed said credit claims for said years 1918, 1920, 1921, and 1922 referred to in paragraph nine hereof, plaintiff on March 13th, 1924, filed with this defendant an alleged claim for refund in the sum of $18,733.87, which defendant duly trans-

mitted to the Commissioner of Internal Revenue at Washing-
37 ton, D. C., but said Commissioner of Internal Revenue had taken no action thereon, on or prior to March 27th, 1924.

Thirteenth. Said plaintiff in filing his original return for said calendar year 1919 had failed to claim a deduction for depreciation on certain real estate in which he had an interest in the city of Chicago and said Commissioner of Internal Revenue on consideration thereof determined and found that plaintiff was entitled to claim as a deduction a portion of said depreciation, and, accordingly, duly issued an account thereof on October —, 1925, a certificate of overassessment for said calendar year 1919 in the sum of $2,319.99.

Fourteenth. It is agreed that certain depositions now on file in this case may be considered by the court in connection with facts heretofore stipulated to be true.

Fifteenth. Said plaintiff has now pending in the District Court of the United States for the Eastern District of Kentucky and action brought by him against the United States in which he is seeking to recover the sum of $5,138.41, the same being a portion of the taxes assessed against him for said calendar year 1919 by the Commissioner of Internal Revenue, which case involves the same question as that presented to the case at bar, to wit, the correctiness of said commissioner's assessment on the proceeds of plaintiff's said insurance policies.

(Signed) ELWOOD HAMILTON,
BECKHAM, HAMILTON & BECKHAM,
*Attorneys for Plaintiff.*

(Signed) W. S. BALL,
*United States Attorney,*
*Attorney for Defendant.*

(Signed) E. H. HORTON,
*Special Attorney,*
*Bureau of Internal Revenue,*
*Of Counsel.*

The plaintiff further offered as evidence upon his part the testimony of witnesses taken by depositions as agreed upon by stipulation, which is as follows:

38 *Stipulation re testimony*

Filed Apr. 11, 1925

In this cause it is hereby stipulated between the plaintiff and the defendant that either of the parties may take the deposition of witnesses they may desire to take by agreement as to time and place, or on reasonable notice to the other party; that said deposition shall be taken before any officer authorized to take depositions in the State where the witness testifies.

The testimony of such witnesses may be taken down stenographically after having been sworn and then transcribed on the typewriter, signature of witnesses being waived.

(Signed) BECKHAM, HAMILTON & BECKHAM,
*Attorneys for Plaintiff.*

(Signed) W. S. BALL,
*Attorney for Defendant.*

Certain exhibits are filed with and made a part of the stipulation of facts, which exhibits cannot be conveniently copied into this bill of exceptions, and on that account said exhibits are permitted to be withdrawn and filed herewith and made a part hereof. There are also certain exhibits filed with and made a part of the depositions, which exhibits cannot conveniently be copied, and are permitted to be withdrawn and filed herewith as a part hereof.

The stipulation of facts hereinbefore copied herein, together with the exhibits, embrace all of the evidence introduced on behalf of the defendant and to sustain the issue upon his part. This was all of the evidence in the case.

The depositions of the following witnesses, Samuel L. Wilson and Walter Gregory Bowerman, were taken, which are in words and figures as follows:

Deposition of SAMUEL L. WILSON taken by Greenwood Reporter at 1111 New York Life Building, New York, New York, to be read as evidence on behalf of the plaintiff on the trial in the above-styled cause.

The witness, being first duly sworn, deposes as follows:

(Interrogated on behalf of plaintiff by Attorney Hamilton.)

59 1st Q. Mr. Wilson, please state your name, age, residence, and occupation.

A. Samuel L. Wilson; age, fifty-eight; residence, 1154 Eighty-third Street, Brooklyn, New York. I am chief clerk of the general division, actuarial department, New York Life Insurance Company.

2nd Q. Are you an actuary, Mr. Wilson?

A. I am not.

3rd Q. Is anybody with the department who is an actuary that we can take today?

A. If necessary, yes.

4th Q. As chief clerk, Mr. Wilson, have you the custody of the policy records of the New York Life Insurance Company?

A. Some of them.

5th Q. Have you custody of the records relating to policies numbered 930,777 and 930,778; amount, $50,000 each; issued to A. J. A. Alexander on the 5th day of June, 1899?

A. They are accessible to me.

6th Q. When were those policies actually issued by the New York Insurance Company, Mr. Wilson?

A. May 19th, 1899.

7th Q. What premium did the policies carry?

A. Thirty-nine hundred and five dollars annually for ten years in each case.

8th Q. Were they participating policies?

A. They were.

9th Q. Would you please tell us what is meant by the term "participating policies"?

A. These policies provided that a dividend would be apportioned to them at the end of the 20-year accumulation period. These were deferred-dividend policies. This period terminated on May 19, 1919. That dividend was to be apportioned provided the insured was living and the policies were in full force on May 19, 1919.

10th Q. How was the dividend to be determined?

A. From the experience of the company within the twenty years.

11th Q. What do you mean by the experience of the company?

A. With respect to these groups. Mr. Bowerman can testify to that more than I can as to the making up of the dividend.

12th Q. Do you have the possession of the records of the New York Life Insurance Company so that you can tell what surplus was apportioned to each of these policies?

40 A. Yes. The accumulated dividend was $10,398.50 in each case.

13th Q. Do you mean on each policy?

A. Yes; on each policy.

14th Q. You say the accumulated dividends on each policy. What do you mean by accumulated dividends?

A. It is the dividend that accumulates to the policy during the 20-year deferred dividend period.

15th Q. How do you determine the accumulations?

A. Well, I said Mr. Bowerman can tell you how the dividends are calculated better than I can.

16th Q. Have you any records in your possession showing the dividends set aside on that policy annually from the date it was issued?

A. I haven't them with me. By the way, I might say this, that there is no dividend set aside on this particular policy each year. The dividend would be set aside for the group.

17th Q. Mr. Wilson, did the New York Life Insurance Company have dividend formulas at the time these policies were issued?

A. They did.

18th Q. Have you a copy of those formulas?

A. I can get copies of the—well, now, you say the formulas in use in 1899. Before I answer that question may I ask you——

Mr. HAMILTON. What I want are the formulas in use at the time dividends were apportioned to these policies.

Mr. WILSON. I can get those for you.

Mr. HAMILTON. Would you please get a copy and file it with our deposition and mark it "Wilson, No. 1"?

Mr. WILSON. These formulas of which you speak are set forth in the reports of this company to the insurance commissioner of the State of New York for the various years.

Cross-examination by Mr. Horton:

1st Q. From your records, Mr. Wilson, was there a beneficiary named in this policy?

A. No, sir. It was payable to his estate.

2nd Q. Administrators, executors, or assigns?

A. Yes. I do not know the exact wording of the policy.

SAMUEL S. WILSON.

61 Subscribed and sworn to before me this 20th day of April, 1925.

[SEAL.] MABEL E. CURRAN,

*Notary Public, Kings County No. 313, Register No. 6348. Certificate filed in New York Co. No. 692, Register No. 6138A.*

My commission expires March 30, 1926.

Deposition of Mr. WALTER GREGORY BOWERMAN, taken at the same time and place, to be read as evidence on behalf of the plaintiff on the trial in the above-styled cause.

(Interrogated on behalf of plaintiff by Attorney HAMILTON.)

1st Q. Please state our name, age, residence, and occupation.

A. Walter Gregory Bowerman; age, thirty-one; residence, 19 Glenwood Avenue, Leonia, New Jersey; occupation, actuary.

2nd Q. Are you connected with the New York Life Insurance Company?

A. I am.

3rd Q. What connection have you with it?

A. I am an assistant in the actuarial department.

4th Q. What experience have you had in valuing insurance policies?

A. I have had about ten years' experience in three or four companies and then actuary and examiner of the insurance department of West Virginia.

5th Q. What professional training did you have to fit yourself as an actuary?

A. I have passed the examination as a fellow of the Actuarial Society of America and as an associate of the American Institute of Actuaries.

6th Q. How long have you been connected with the New York Life Insurance Company?

A. Since November 16th, 1919.

7th Q. What insurance companies have you been connected with since you started in your line of work?

A. The Equity Life, of New York; the George Washington Life, of Charleston, West Virginia; and the New York Life.

62 8th Q. Have you access to the records of the New York Life Insurance Company as they relate to the two life insurance policies issued on the life of A. J. A. Alexander in 1899?

A. I have.

9th Q. Please give me the date and amount of those two policies.

A. The date of issue of each policy was the 19th of May, 1899, and the face amount of each policy $50,000.

10th Q. To what particular class of policies do these policies belong?

A. These policies are what are called 4% bond policies, payable by ten annual premiums maturing at the end of twenty years, with an accumulated dividend payable at that time.

11th Q. What do you mean by 4% policies?

A. A 4% bond policy has a provision in it showing the method in which the settlement may be made at maturity.

12th Q. What relation has 4% to that?

A. Simply that in one of the options that funds may be left with the company and a guarantee be made of not less than 4% each year.

13th Q. Does that 4% commence before or after the maturity of the policy?

A. After the maturity.

14th Q. Were these policies called group policies?

A. There is also a provision in the policy providing that the amount payable in the event of the death of the insured subsequent to the end of ten yars from issue and before the end of twenty years shall be definite amounts ranging from $50,000 to $72,150 00 per policy.

15 Q. You say that provision related to the insured dying within the 20-year period and subsequent to the 10-year period?

A. Yes.

16th Q. What particular part of the policy do you refer to, Mr. Bowerman?

A. On the top of the second page of the policy under the heading "Special advantages" a table is given showing "Table of amounts payable in event of death during the accumulation period if premiums are paid in full to date of death."

17th Q. What amount would have been paid on this policy if Mr. Alexander had died March 1st, 1913?

A. The amount as set forth in the table referred to in event of death with the fourteenth policy year is $57,000 on each policy.

18th Q. Did the New York Life Insurance Company have in 1899 regular dividend formulas?

A. I don't believe I could say what formulas they had in 1899.

19th Q. Have you access to the records of the company as you could ascertain whether or not it did have any dividend formulas at the time this policy was issued, and do they have now?

A. I haven't seen any formulas that were in use in 1899 for the calculation of dividends. We do now have formulas for that purpose.

20th Q. Did the New York Life Insurance Company have dividend formulas at the time these two policies were issued, Mr. Bowerman?

Mr. HORTON. That is hardly a fair question to ask Mr. Bowerman.

A. I do not know.

21st Q. Were these policies group policies?

A. I do not believe I understand what you mean by group policies.

22nd Q. Did these policies of Dr. Alexander participate in all of the surplus of the company?

A. Each policy provided for participation in surplus on the 19th day of May, 1919, if the insured were then living and all premiums were duly paid.

23rd Q. Was that participation in the surplus that was attributable to a group of policies or to all the policies of the company in force on that day?

A. Did it apply to a group or to all the policies of the company?

24th Q. Yes. I mean the surplus that this policy was to participate in, was it to be the surplus attributable to all the policies or to a particular group of policies? In other words, did every policy that you had in existence at that time participate in the surplus, or did these policies participate only in surplus that was attributable to a group or class of policies?

A. The policy states "This insurance bond participates in surplus as hereinafter provided."

25th Q. Well, now, what surplus does that relate to?

A. The policy does not state the answer to that question. The practice of the company in 1919 was to make up what is called a dividend history. These histories are made up for broad groups of policies, showing the experience of the company with respect to mortality, withdrawal, surrender values paid, interest earned, and other factors. The result of these histories shows, in a broad
64 way, the funds earned by typical groups of policies, and from these histories the actual surplus to be distributed is calculated very simply.

26th Q. How did the New York Life Insurance Company determine what sum would be paid to Mr. Alexander when these two policies matured?

A. Such a dividend history as I have just referred to was made up, and the values obtained at quinquennial ages were interpolated to give the values at the actual age at issue of these policies. The details of this method are set forth under similar policies in the annual report of December 31st, 1919, to the superintendent of insurance of New York State.

27th Q. Please file with your deposition a copy of the history that was made up at the time you determined what sum was payable to Dr. Alexander on account of these two policies.

A. I think we can file a sheet that will show the principles which underly that method and an example for a typical policy where the main principles are the same.

28th Q. What is the reason that you can not give these as to these two particular policies?

A. This printed form that we have for presenting to the insurance department is made up to show the main principles involved in typical ages for the large group of policies.

29th Q. When you speak of a large group of policies, what do you mean by that; that is rather an indefinite term?

A. Well, we have a history made up for such a group as is called the nonforfeiting group.

30th Q. Well, do these apply to that group?

A. These are in much smaller group that I question whether the report to the insurance department has an example of the calculation of the accumulation group to which these policies belong.

31st Q. When did you first know the exact sum that the company owed Dr. Alexander?

A. The amount payable, of course, is payable in event that the insured is living at the maturity of the policy. The calculations showing the amount which would be payable if the insured were then living were probably made about a year previous to the maturity.

32nd Q. Well, in fact, when were they made?

A. They were probably made about a year previous to the maturity of the policy.

33rd Q. Is there anything in the files of the company showing just how you determined the value of these policies at the maturity date?

A. No doubt the principles governing the calculations are in the files of the company, but, obviously, there is a good deal of clerical work which is not put out in writing; it is simply done at the time and the results are distributed and the details are not retained.

34th Q. It isn't a guess, is it?

A. Certainly not. The method of board averages has to be followed, of course, regarding ages and small groups of policies. For instance, the interest earned is that earned on all the investments of the company; profits and losses from investments are distributed over a number of years.

35th Q. How many years? What I would like you to do if you can, without me making you questions, is to tell us the exact method that you used or would have used in determining how much was paid to Dr. Alexander at the maturity of these policies.

Mr. Horton. The method the company used as he knows it.

Mr. Hamilton. Yes.

A. There is a paper which was published in 1905 written by the now vice president of the New York Life, Rufus W. Weeks, which explains in about thirty or forty pages the principles to which you refer. This paper is referred to in the annual statement made to the superintendent of insurance.

36th Q. Were the accumulations on these policies fixed with mathematical accuracy at the time they matured?

A. As I understand the question, my answer is "Yes."

37th Q. Now give me the method that you used in determining with mathematical accuracy the sum to be paid.

A. The description of the method involve two or three hours and it is all in black and white by the vice president of the company, and the digest of it, which is published every year, is available for the year 1919.

38th Q. I am afraid I would not understand it, and I am afraid the court would not understand it. Will you state briefly just how you determined the amount that was paid?

A. The principle involved in distributing accumulation div.-
66 dends at maturity of such policies as the two policies referred to is the principle of averages. There are certain factors——

39th Q. Well, now, would you give us those factors which are taken for the entire company?

A. You mean for all the policies of the company?

40th Q. Yes; for all the policies of the company.

A. There are other factors which are particularly all located and calculated for small groups of policies——

41st Q. This was a small group?

A. For example: In the calculation of the accumulation dividends under these policies the interest rates used was the interest rate earned on the investments of the entire company, while the withdrawal rate was a rate determined from the deferred dividend policies of the company issued in a group of years, and that rate was then further modified with respect to the age of the insured and the size of the premium paid under each policy.

42nd Q. What was the amount paid at the date of maturity of these policies?

A. The amount of the accumulation dividend paid under each policy at maturity was $10,398.60. The face amount of each policy was $50,000, making a total sum paid at maturity of $60,398.50.

43rd. Q. When was the surplus earned by the company that each of these policies participated in?

Mr. Bowerman. When was the surplus earned?

Yes.

A. It is provided in each policy that no dividends shall be apportioned to the policy prior to the 19th day of May, 1919. However, the company maintained funds each year representing the amount which had accrued under its deferred dividend policies which were issued in the previous years.

44th Q. When did dividends first begin to accrue on these policies?

A. For a period of several years after the issue of these policies there was probably no surplus available because of the heavy initial expenses incident to the issue of life insurance policies.

45th Q. What was the annual premium on each of these policies?

A. The annual premium on each policy payable for ten years was $3,905.00.

46th Q. What was the cost of writing these two particular policies?

67 A. The cost of writing the policies involves a commission to the agent, the expenses at the home office of making up the records, and the examination of the insured and the numerous other items of overhead expense incident to the issue of new life-insurance policies. It is very difficult to assign numerical values to these costs for any individual policy alone.

47th Q. Well, what was the cost of writing this particular group?

A. We do not have numerical figures for that.

48th Q. You said these policies were assigned to a smaller group in answer to a question a moment ago. What group were they assigned to?

A. I stated at the beginning of my testimony the description of the policies both as regards premiums and the insurance benefits, including the dividend class to which they belonged.

49th Q. Well, I know; but to what class did they belong? How did you determine the class they were to go in?

A. The dividend class is called the 20-year accumulation class.

50th Q. How many policies did the New York Insurance Company have in effect when these policies were issued belonging to that class?

A. I do not know.

51st Q. Is there any way you can ascertain that?

A. I think it would be rather difficult to find the figures of that year, but it is——

52nd Q. Were they classified as to ages, Mr. Bowerman?

A. Well, the calculations of accumulation dividends are, of course, made up first for the dividend class and then distributed according to age.

53rd Q. What reserve did the company begin to accumulate from the date of the policy to pay the policies at maturity? In other words, you knew, or, rather, the company knew, at the time it issued these policies that it had to pay certain definite sums if the insured lived until the year of 1919. Now, what reserves did you build up to pay the policies at maturity?

A. There were two reserves set aside for that purpose; one was the policy reserve liability and the other was the amount provisionally ascertained and held waiting apportionment at maturity of the policies, representing the surplus accrued at the end of each year, to be later allocated to the individual policies making up the group of deferred dividends of the company.

68 54th Q. What reserves had been accumulated to pay these particular policies December 31st, 1912, Mr. Bowerman?

A. I could answer that question for March 1st, 1913, because I have the figures here.

Mr. HAMILTON. All right.

Our records show that the share of each of the above policies in the aggregate sum provisionally ascertained and held awaiting apportionment was on March 1st, 1913, $6,800. The total value of each policy on March 1st, 1913, including the sum provisionally ascertained and held awaiting apportionment was $44,100.

55th Q. What would be the total of those two sums?

A. That is the total sum on each policy.

56th Q. Including the full force to pay the contingent liability, you say it was $44,000.

A. The total value of each policy, including the sum provisionally ascertained and held awaiting apportionment is $44,100.

Mr. Horton. What was the sum at this date other than the unapportioned dividend at that date?

That sum on each policy was $37,300.

And what did that represent?

That represented the sum shown in the policy under the table "Table of loans and surrender values" in the column called "Loans."

57th Q. These policies did not have any surrender value, did they?

A. The policies provided for loans and for paid-up insurance and extended insurance for a definite number of years and months. The last two columns are termed in the policies "Surrender values."

58th Q. But they did not have any surrender values ordinarily used, did they?

A. There is no amount in the policies designated "Cash-surrender value."

59th Q. Well, then, the policies did not have a provision for cash-surrender value that is ordinarily used at the present time in insurance policies.

A. It is true that the column in the policy is called "Loans" and it is not called "Cash-surrender value."

60th Q. What were the surplus accumulations on these policies December 31st, 1914?

69 A. I do not have figures showing the share in the unapportioned surplus funds of the company at December 31st, 1914.

61st Q. Well, didn't the accumulations on these policies occur regularly over the life of the policies?

A. The surplus funds increase more and more rapidly for each year of duration of the policy so that there is more surplus added to the unapportioned funds in the latter part of the accumulation period than in the first part. However, under these policies, since they were payable by ten annual premiums, the proportion earned in the first ten years was to that extent increased.

62nd Q. Well, these policies did not earn any more, relatively, from March 1st, 1913, up to the date of maturity than they did before, did they?

A. The answer to this question can be seen by comparing the $6,800 share on March 1st, 1913, with the $10,398.50 actually paid on May 19th, 1919, which was practically six years later.

63rd Q. Well, that is comparing with the group where the premium was paid annually up to maturity, isn't it?

A. No.

64th Q. What is it that caused it to earn more during the years subsequent to March 1st, 1913?

A. The difference between $6,800 and the amount paid as dividend at maturity is $3,598.50.

65th Q. What is the reason for that?

A. During the period from March 1st, 1913, to the maturity of these policies there were gains from mortality, from interest, and from miscellaneous minor sources of income.

66th Q. Do you mean it was more in those years than in other years?

A. No.

67th Q. What was the present value of those policies March 1st, 1913—on each of them?

A. I do not have a calculation showing the reserve value set aside by the company at that date. The loan value that I quoted above is the only value I have corresponding to that.

68th Q. Well, is that the same as the present value March 1, 1913?

A. No.

69th Q. Assuming that Dr. Alexander retained his policies to maturity and he was paid according to the provisions of the policy, what was the present worth of those policies March 1st, 1913?

70 A. I do not have figures here showing anything other than the figures that I quoted for that date.

70th Q. Could you ascertain those for me?

A. I could find out what the reserve was that was held by the company at the end of 1912 or 1913.

Will you do that and complete the answer to the question, unless there is some objection to it?

(See figures on sheet 21–a.)

71st Q. What was the total reserve of the company for liability and dividends on the group policies to which these policies belonged March 1st, 1913?

A. I do not have our figures available in that form.

72nd Q. Well, in what form have you them?

A. We have rates per thousand for each type of policy that we have on our books and then we have them for other groups which are quite different from the dividend groups.

20 PAY. 20-YEAR 4% BOND ISSUED 1899, AGE 24. $50,000. A. P. $3,905

VALUES PER EACH POLICY

| End of pol. year | Insurance reserve liability | | Funds provisionally ascertained and held awaiting apportionment | End of pol. year | Insurance reserve liability | | Funds provisionally ascertained and held awaiting apportionment |
|---|---|---|---|---|---|---|---|
| | Basis of policy guarantees | Basis held by company | | | Basis of policy guarantees | Basis held by company | |
| | (1) | (2) | (3) | | (1) | (2) | (3) |
| 1 | $2,650 | $2,650 | 0 | 11 | $36,500 | $44,800 | $3,200.00 |
| 2 | 5,400 | 5,400 | 0 | 12 | 37,800 | 46,050 | 5,550.00 |
| 3 | 8,300 | 8,800 | 450 | 13 | 39,200 | 47,400 | 6,250.00 |
| 4 | 11,300 | 12,200 | 1,100 | 14 | 40,650 | 48,750 | 6,750.00 |
| 5 | 14,400 | 15,800 | 1,750 | 15 | 42,050 | 50,100 | 7,350.00 |
| 6 | 18,150 | 19,150 | 2,400 | 16 | 43,550 | 51,500 | 7,950.00 |
| 7 | 22,000 | 23,000 | 3,000 | 17 | 45,100 | 52,950 | 8,450.00 |
| 8 | 26,050 | 26,800 | 3,750 | 18 | 46,700 | 54,400 | 9,000.00 |
| 9 | 30,300 | 30,900 | 4,500 | 19 | 48,300 | 55,900 | 9,700.00 |
| 10 | 33,200 | 38,750 | 4,850 | 20 | 50,000 | 57,450 | 10,300.00 |

71 The basis of the values in the first column above is the actuaries or combined experience table of mortality and 4% interest, which is also the legal minimum basis of valuation for the policies in question.

The reserve held by the company, as shown in column two above, is on the following basis:

| Years | Basis |
|---|---|
| 1 to 9 | Actuaries, 4%. |
| 10 | American experience, 3½%. |
| 11 to 20 | American experience, 3%. |

In all cases the loan value available is less than the insurance reserve liability on the basis of policy guarantees.

73rd Q. Well, could you give it to me as reserve for liability on the policies March 1st, 1913?

A. I can give you the reserve liability at the end of each of the calendar years 1912 and 1913 on these policies as they were held at that time by the company, and I have given you the value as of March 1st, 1913, of the share in the funds provisionally ascertained and held awaiting apportionment.

74th Q. Yes; you have given me that; but you have not given the reserve for the liability.

A. No; that is what I can obtain.

Mr. HAMILTON. Well, will you do that and complete your answer? (See figures on sheet 21–a.)

75th Q. Would you please furnish the reserve for liability on these policies from the date of issue annually during their life and also the reserve for dividends annually from the beginning of the policy to its maturity date, and if you are unable to furnish these two reserves allocated to the group to which the policies belong?

Mr. HORTON. An objection to the last part of the question on the ground that it is immaterial to this case because it does not show the segregation of these two policies.

A. The policy reserve is not difficult to get, because there are tables all made up for that, but the other is rather a long calculation.

76th Q. I believe you stated that these were 4% policies?

72 A. That is part of the title of the policy as it is described in our calculations, and there is a guarantee in the policy that——

77th Q. What you mean by 4% is to invest the premium so that the premium invested will yield that net annually?

A. One of the provisions under the accumulation benefits provided at the maturity of the policy is that the person at interest may receive an income of $——— per annum during life, being equal to 4% of the total amount of premiums taken at the tabular annual rate, and receive the dividend converted into a life annuity and

continue this insurance bond without further payment of premiums. That is where the title "4%" enters into the contract.

78th Q. Mr. Bowerman, you say that these particular policies—that the accumulations were more subsequent to March 1st, 1913, than prior to March 1st, 1913?

A. The accumulation in the dividend fund?

79th Q. Yes; the dividend fund and the reserve.

A. No. We stated the figures in the dividend fund, which changes from $6,800 to $10,398.50. That increase of $3,598.50, of course, is less than the $6,800 under each policy; thus there was $3,500 approximately, that accumulated after March 1st, 1913.

80th Q. How did the liability reserve accumulate on these particular policies; is that the same each year?

A. Although I do not have a calculation showing these policies, an index of it is obtained from the increase in the loan value of the policies, which changes from $37,300 at the end of the thirteenth year to $50,000 at the end of the twentieth year.

81st Q. The loan value, however, is less than the liability reserve?

A. The company does not loan more than the liability reserve; it is either less or equal to the liability reserve.

82nd Q. Well, in this particular case, was the liability reserve less or equal or more than the loan value?

A. I do not have those figures. Those are the figures I am going to supply.

Cross-examination by Mr. HORTON:

1st Q. Mr. Bowerman, do your records show that any loans were made on these policies?

A. Yes; they do.

2nd Q. Will you state what those are and when?

73 A. Our records show the following entries regarding loans on these policies:

POLICY 950,777

| Date of loan or reduction of increase: | Loan |
|---|---|
| June 1st, 1910 | $32,700 |
| May 9th, 1911 | 34,900 |
| May 9th, 1913 | 25,000 |
| March 9th, 1914 | 5,000 |
| May 19th, 1914 | 0 |

POLICY 950,778

| Date of loan or reduction of increase: | Loan |
|---|---|
| November 19th, 1913 | $39,700 |
| December 30th, 1914 | 35,000 |
| October 18th, 1916 | 32,000 |
| January 31st, 1917 | 30,000 |
| November 23rd, 1918 | 20,000 |
| May 13th, 1919 | 0 |

3rd Q. How was the loan value on this last policy, the loan made November 19th, 1913, $39,700, computed?

A. The amount is the amount shown in the policy as the guaranteed loan at the end of the fourteenth year, which would be at May 19th, 1913.

4th Q. Now, what relation did that loan have to the reserve fund?

A. The reserve fund would either be equal to or greater than the loan value.

5th Q. That is, this loan was not equal to the reserve fund on that date?

A. It would not be greater than the policy reserve liability.

6th Q. The policy reserve liability?

A. That is the reserve liability excluding any share in undivided, provisionally ascertained surplus.

7th Q. That was also true of the loans on the other policy, the same statement?

A. Yes.

8th Q. And that is always true, according to your experience and the practice of the company?

A. The insurance laws provide that any excess of loan over policy reserve liability shall be deducted as an asset not admitted and reliable and well-established companies do not loan more than the reserve liability attributable to the individual policy.

74 9th Q. Then this loan was not based, as I understand you, upon any consideration of this deferred dividend reserve?

A. There is no share of the deferred dividend in such a loan.

10th Q. And there never is any share in the deferred dividend reserve, in the case of a loan, under such policies as these?

A. Not in this company.

11th Q. Now, you understand the controversy here in the case is the March 1st, 1913, value of these policies. Could the surrender value of these policies have been demanded on March 1st, 1913, and, if not, was it a policy of the company to pay surrender values on such policies in 1913 if they had been demanded?

A. The loan value was available and the insured had the right to surrender his policy after obtaining that loan, without repayment.

12th Q. What was the maximum loan value on these policies on their surrender March 1st, 1913?

A. On each policy, $37,300.

13th Q. On March 1st, 1913, that would be a total on both policies of $74,600?

A. Yes.

14th Q. On the other hand, what was the total of premiums that had been paid on the policies on that date?

A. $39,050 each.

15th Q. That is a total of $78,100?

A. Yes.

16th Q. Why was it that the surrender value of these policies, had such surrender value been asked March 1st, 1913, was not equal to the amounts of the premiums which had been paid, $78,100?

A. That is due, briefly, to two reasons, one being that the policy, although a 20-year bond policy, is paid up entirely at the end of ten years by ten annual premium payments; and, secondly, that the cash value of the policies is, as with all life insurance contracts, the amount which remains after the death losses have been paid for the period elapsed from issue of the policy.

17th Q. Can you state whether or not this policy was in the nature of a 10-year payment, 20-year endowment, with a 20-year deferred dividend; was that the nature of the policy?

A. That is the nature of the policy, with the exception that the policy is called an insurance bond with guaranteed interest, which is not quite so simple as the term "endowment" as it is usually employed.

75 18th Q. The matter to which you have just referred is one of the four options granted by the policy, is it not?

A. There are several features, as I testified earlier in the day, which distinguish the 4% bond policies, such as these contracts; one is the increased death benefit beyond the face during the period from the end of the tenth to the end of the twentieth years, which is during the accumulation period; and the other is in the special options allowed at the maturity of the policies.

19th Q. What happened in this case was the surrender of the policies and a cash payment at the end of the accumulation period?

A. Yes.

20th Q. What interest did Dr. Alexander have in these accumulations prior to May, 1919; that is to say, were they payable to him in event of his death or to anyone? Would any portion of the dividends set aside for the class in which Dr. Alexander's policies belonged have been paid to him in the event of surrender in 1913?

21st Q. Where were these policies of insurance issued, Mr. Bowerman, if you know?

A. The question of jurisdiction of the insurance policy is a legal question that I am not competent to answer, since it varies with different jurisdictions. The policy states that the New York Life Insurance Company agrees to pay the face amount at the home office of the company in the city of New York upon receipt of and approval of proofs of death, etc.

22nd Q. Do you know where the policy, as a fact, was actually issued?

A. That is the legal question which I am not competent to answer.

23rd Q. I am asking for a fact, if you know.

A. That to my mind depends upon the meaning of the word "issue." Do you mean whether it was actually signed here in the home office?

24th Q. Is there any knowledge you have of that?

A. The policy was actually written and sent out from the home office.

25th Q. Mr. Bowerman, will you define what you mean by "tabular annual rate" used in the policy, the expression you used—whether it means the gross premium or net premium?

A. The tabular annual rate of premium paid refers to the gross premium paid by the insured.

26th Q. And not to the net premium?

A. Not to the net premium.

76 27th Q. Mr. Hamilton asked you about how the costs of these policies were determined. Can the actual costs of these policies be predetermined or is the cost determined subsequent to their issue upon the company's experience?

A. Under participating policies the gross premium which is charged is determined in advance with a sufficient margin to allow for contingencies and normal distribution of surplus which remains after the contingencies which have occurred have been provided for.

28th Q. You mean there is a net premium calculated and then a loading to take care of these contingencies you speak of?

A. Yes; and also to provide for a normal surplus distribution.

29th Q. I wish you would define what you mean by the term "deferred dividend."

A. A dividend is a refund of premium and a deferred dividend is a dividend which, it is provided in the insurance contract, is not apportionable until the end of a deferred period. It is payable, as stated in the contract, only in event of the insured being still alive and premium payments having been duly made.

30th Q. Then, if I understand you, this deferred dividend is the excess over the cost of the insurance which is accumulated during the term of the premiums paid.

A. The cash value of the policy is the excess which remains from the net premiums paid over the insurance cost of the policy accumulated with interest and benefit of survivorship, and the dividends are, similarly, the excess of the gross premiums paid accumulated with interest and benefit of survivorship over the cash value of the policy and the mortality and other charges which occur each year.

31st Q. Can you state again what the cash value of these insurance policies were on March 1st, 1913?

A. The cash value of each policy on March 1st, 1913, was $37.20, which is less than the total premiums paid to the anniversary in 1913. The share of each of the above policies in the aggregate sum provisionally ascertained and held awaiting apportionment was on March 1st, 1913, $6,800. The total value of each policy on that date, including the sum provisionally ascertained and held awaiting apportionment, was $44,100.

32nd Q. Do you know whether or not under the rules of the New York Life Insurance Company this policy could have been assigned by Dr. Alexander on March 1st, 1913?

77 A. The policy states at the bottom of the third page: "Any assignment of this insurance bond must be made in duplicate and both sent to the home office, the duplicate to be retained by the

company and the other to be returned. The company has no responsibility for the validity of any assignment."

33rd Q. The amount of the dividend provisionally ascertained, as you have stated, could not be determined by the company until after the experience of the company was known, could it? I mean during the period these policies were in existence.

A. The amount set aside at the end of each calendar year is determined from the experience of the preceding calendar year.

34th Q. Up to the time these policies matured it was only the company's experience that could determine how much would be reserved for those deferred dividends, while, on the other hand, the reserve on the policy itself was predetermined upon your mortality tables?

A. Yes.

35th Q. Then the reserve for the policy was a predetermined reserve, while that for the dividends had to be varied according to the experience of the company?

A. Yes. The policy reserve liability was determined according to standards set down by the insurance departments.

Redirect examination:

1st Q. The liability reserve on the policy is that calculated at 3% or 4%.

A. The minimum basis for the policy reserve liability which shall be held is specified in the insurance laws of New York State. The company has, however, at various times strengthened its reserves and, as permitted by law, has held more than the minimum basis.

2nd Q. Well, what is the minimum basis?

The March 1st, 1913, liability reserve—is that calculated at 3% or 4%?

(For answer see page 20-a.)

3rd Q. Where was the application for this policy written?

A. The application consists of two parts—one the part made directly to the New York Life Insurance Company and the other consisting of answers to the medical examiner and the medical examiner's report. Both are signed by the insured. The former was dated at Spring Station, Kentucky; the latter states that the
78 applicant was examined at Woodburn, Woodford County, Kentucky.

4th Q. Where was the policy delivered; at what place?

A. As far as I can determine from a brief inspection of the records, the policy was sent, in accordance with the company's practice, to the branch office in Kentucky to be delivered to the parties at interest.

5th Q. If Dr. Alexander had surrendered the policy to the company March 1st, 1913, how much money would he have received?

A. Under each policy he would have received $37,300, less any outstanding loans and unpaid loan interest.

6th Q. What substantial rights would he have lost under the contract if he had surrendered it on that date?

A. He would have received all that the contract of insurance provided that he would receive. He would, however, in accordance with the terms of the contract, lost any benefit which would accrue to him in later years from the dividends payable at maturity, no portion of which would be payable to him at surrender on March 1st, 1913.

7th Q. He would also have lost the $100,000 that he received on maturity of the policies, or part of it?

A. He would lose the excess of that over the value paid.

8th Q. What was the intrinsic worth of these insurance policies to Dr. Alexander on March 1st, 1913, according to their terms and provisions, assuming that he was going to keep them until maturity?

Mr. Horton. I object to that question on the ground that the intrinsic worth to him on March 1st, 1913, was what he could have received on March 1st, 1913, from the company for his policy.

A. The chief point at issue in this question is, I take it, the question of the accrued but unapportioned surplus. It is a question for the courts to determine whether some part of the surplus then apportioned to the policies should be considered, for the purposes at hand, to have accrued on March 1st, 1913. The facts are as already stated.

(Signed) WALTER GREGORY BOWERMAN.

79 Subscribed and affirmed to before me this 20th day of April, 1925.

[SEAL.] (Signed) MABEL E. CURRAN,
*Notary Public, Kings County, No. 313, Registered Number 6138. Certificate Filed in New York County, No. 692, Register Number 6138A.*

My commission expires March 30, 1926.

STATE OF NEW YORK,
*County of New York.*

I, Mabel E. Curran, a notary public within and for the above county and State, do certify that the foregoing depositions of Samuel L. Wilson and Walter Gregory Bowerman were taken before me at the time and place stated in the caption; that said witnesses were first duly sworn before giving it, and same was written by me in his presence, read to and subscribed by him in my presence. The plaintiff was present by Attorney Hamilton, and the defendant was present by Attorney Horton.

In testimony whereof I have hereunto set my hand and notarial seal this 20th day of April, 1925. My commission as notary public expires on the 30th day of March, 1926.

[SEAL.] (Signed) MABEL E. CURRAN,
*Notary Public, Kings County, No. 313, Registered Number 6138. Certificate Filed in New York County, No. 692, Register Number 6138A.*

My commission expires March 30, 1926.

*Order settling bill of exceptions*

And now, in furtherance of justice, and that right may be done, the defendant tenders and presents the foregoing as his bill of exceptions in this case to the action of the court, and prays that the same may be settled and allowed and signed and sealed by the court and made a part of the record, and the same is accordingly done this the 30 day of April, 1927.

CHAS. I. DAWSON, *Judge.*

Approved April 30, 1927.
ELWOOD HAMILTON, *Atty. for Plf.*
T. J. SPARKS, *Atty. for Deft.*

80 In United States District Court

*Plaintiff's petition for writ of error*

Filed May 11, 1927

And now comes A. J. A. Alexander, plaintiff herein, and says that on or about the 9th day of March, 1927, this court entered judgment herein in favor of the plaintiff, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Sixth Circuit for the correction of errors so complained of and that a transcript of the record, proceedings, and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals.

BECKHAM, HAMILTON & BECKHAM,
*Attorneys for Plaintiff.*

In United States District Court

*Plaintiff's assignment of errors*

Filed May 11, 1927

The plaintiff makes the following assignments of errors, which he avers occurred in the trial of this cause, and prays for a reversal of the decree of the District Court and for judgment as prayed for in his original petition:

First. The court erred in holding that the plaintiff realized any gain or taxable income out of the sum received, to wit, $120,797.00, from the New York Life Insurance Company on the surrender of the two insurance policies on May 19, 1919.

Second. The court erred in holding that the two insurance
81 policies above referred to had a value March 1, 1913, of only $93,587.81, when in fact said policies had a value March 1, 1913, of $115,311.00.

BECKHAM, HAMILTON & BECKHAM,
*Attorneys for plaintiff.*

## In United States District Court

*Defendant's petition for writ of error*

Filed May 11, 1927

And now comes Robert H. Lucas, as collector of internal revenue for the district of Kentucky herein, and says that on or about the 9th day of March, 1927, this court entered judgment herein in favor of the plaintiff and against this defendant in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

The defendant states that the above-entitled cause is one in which the United States and not the record defendant is the real party in interest in said cause, and this appeal is being taken by direction of the Department of Justice of the United States of America.

Wherefore this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of errors so complained of, and that a transcript of record proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

T. J. SPARKS,
*United States Attorney.*
*Attorney for Defendant.*

82 In United States District Court

*Defendant's assignment of errors*

Filed May 11, 1927

Comes now the defendant in the above-entitled cause, Robert H. Lucas, as collector of internal revenue for the district of Kentucky, and presents to the court his assignment of errors which he alleges were committed in the trial and proceedings in the above cause to his prejudice and injury, as follows:

1. The court erred in adjudging that the fair cash value of the two insurance policies in controversy was $93,587.81 on the 1st day of March, 1913.

2. The court erred in fixing the value of said two insurance policies as of March 1st, 1913, in any greater sum than $78,100.00.

3. The court erred in adjudging that the amount of profit derived by plaintiff from said two insurance policies as of May 19th, 1919, was only $27,209.19.

4. The court erred in refusing to adjudge that the profit derived by plaintiff from said two insurance policies as of May 19, 1919, was any less than $42,697.00.

5. The court erred in giving plaintiff judgment for the sum of $6,519.36.

6. The court erred in refusing to dismiss plaintiff's petition on final hearing and giving to defendant judgment for his cost in this action expended.

Wherefore defendant prays that said decision be reversed and that the said court may be directed to enter decree in accordance with the prayer of defendant's answer; that is, that the plaintiff's petition herein be dismissed.

T. J. SPARKS,
*United States Attorney,*
*Attorney for Defendant.*

63 In United States District Court

*Order allowing writ of error for both plaintiff and defendant, May 11, 1927*

On the 11th day of May, 1927, the above-named plaintiff, A. J. A. Alexander, appearing by Elwood Hamilton, his attorney, and the above-named defendant, Robert H. Lucas, collector of internal revenue for the district of Kentucky, appearing by T. J. Sparks, United States attorney, his attorney, and each party filed herein and presented to the court their petitions praying for the allowance of writs of error and assignments of error intended to be urged by each of them; and also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Sixth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

To the filing of the petition and for the allowance of the writ of error on behalf of the defendant, Robert H. Lucas, collector of internal revenue for the district of Kentucky, the plaintiff, A. J. A. Alexander, objected on the ground that the petition and assignment of error had not been filed by the defendant before the settling of the bill of exceptions herein, and the court, being advised, overruled said objection to which the plaintiff objected and excepted.

And on consideration thereof, the court does now allow the writ of error as prayed in the petitions of both plaintiff and defendant, the petition of the defendant being granted without bond, it appearing that the above-entitled cause is one in which the United States and not the record defendant is the real party in interest in said cause, and this appeal on behalf of the defendant being taken by direction of the Department of Justice of the United States of America.

84 **In United States District Court**

***Stipulation re record***

Whereas it appears in the above-entitled cause from the record herein that in the preparation of the bill of exceptions there was omitted an answer to a question propounded by the attorney for the plaintiff in error on cross-examination of the witness, Walter Gregory Bowerman, which question is numbered No. 20. The answer as it appears in said deposition is as follows:

"No. The policy specifically states that no dividends shall be apportioned to the policy prior to the 19th day of May, 1919."

This omission was merely an oversight in copying said deposition as a part of the bill of exceptions herein.

And whereas it further appears that the plaintiff in error omitted to include in the præcipe motion for judgment on behalf of defendant, filed in the court below, June 10, 1926, which motion should be a part of the record herein;

And whereas, on account of said omissions, the clerk of the court below was unable to include in the record sent up to this court that part of the bill of exceptions and that part of the record hereinbefore described,

It is now herein agreed by the parties, through and by their respective counsel, that the record in this cause, filed by the clerk on the ——— day of June, 1927, be amended by attaching thereto the omitted part of the bill of exceptions and the omitted part of the record hereto attached and marked "Exhibit A," to this stipulation, and that the same may be filed in this court as part of the record herein and in so far shall have the same effect as if the record herein filed had been complete at the time.

There is attached hereto and made a part hereof the omitted answer as it appears in the deposition hereinbefore described, and the omitted motion for judgment on behalf of defendant, certified as being true and correct copies of part of this record by the clerk of the court below.

This the 7th day of June, 1927.

T. J. Sparks,
*U. S. Atty., Counsel for Plaintiff in Error.*
Elwood Hamilton,
*Counsel for Defendant in Error.*

Approved:
Denison, J.

85 (Stamped on back:) Filed Jun 8, 1927. Arthur B. Mosman, clerk.

The answer to question No. 20, in the cross-examination of witness Walter Gregory Bowerman, as found on page 28 of the bill of

exceptions heretofore filed. The answer to said question in words and figures is as follows:

"No. The policy specifically states that no dividends shall be apportioned to the policy prior to the 19th day of May, 1919."

UNITED STATES OF AMERICA,
Western District of Kentucky, ss:

I, Lilburn Phelps, clerk of the District Court of the United States for the Western District of Kentucky, certify that the last foregoing paragraph enclosed in quotation marks is a correct copy of answer to question No. 20, in the cross-examination of Walter Gregory Bowerman, as appears from the original deposition on file in my office in case at law No. 788, wherein A. J. A. Alexander is plaintiff, and Robt. H. Lucas, collector of internal revenue for the district of Kentucky, is defendant, as appears from the original on file in my office. This June 7th, 1927.

[SEAL.] LILBURN PHELPS, *Clerk.*

In United States District Court

*Motion for judgment on behalf of defendant*

Now comes defendant herein before judgment and moves the court to enter judgment in his favor and against plaintiff herein for the following reasons, to wit:

First. That plaintiff has adduced in this case no substantial evidence which would warrant a judgment in his favor and against this defendant.

Second. That on March 1, 1913, there had not been credited to plaintiff by the New York Life Insurance Company on his policies of insurance any portion of the earnings and profits of said company.

Third. That under the revenue act of 1918 the March 1, 1913, market price or value of plaintiff's policies of insurance with the New York Life Insurance Company did not exceed the total premiums paid by him to said company on said policies, to wit, $78,100.00.

Fourth. That plaintiff, under the revenue act of 1918, on the surrender of his policies of insurance in the calendar year 1919 to the New York Life Insurance Company for the sum of $120,797.00 in cash realized taxable gain, income, or profits in said calendar year 1919 of the difference between the total premiums paid by him, $78,100.00, and said cash surrender value of $120,797.00, amounting to the sum of $42,697.00.

Fifth. That the additional taxes for the calendar year 1919, paid by plaintiff and sought to be recovered by him in this action, were

lawfully assessed and legally collected, and by reason thereof plaintif is not entitled to recover any part thereof as against this defendant.

Respectfully submitted.

W. S. Bailey,
*United States Attorney,*
*Attorney for Defendant.*

E. H. Horton,
*Attorney, Bureau of Internal Revenue, of Counsel.*

[Certificate to foregoing paper omitted in printing.]

87 In United States District Court

*Writ of error*

United States Circuit Court of Appeals for the Sixth Judicial Circuit, ss:

*The President of the United States to the honorable the Judge of the District Court of the United States for the Western District of Kentucky, Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you or some of you, between A. J. A. Alexander and Robert H. Lucas, collector of internal revenue for the district of Kentucky, a manifest error hath happened, to the great damage of the said Robert H. Lucas, collector of internal revenue for the district of Kentucky, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the clerk of the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, Ohio, in said circuit, on the * 10 day of June next,

88 in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the law and customs of the United States, should be done.

Witness the honorable William H. Taft, Chief Justice of the United States, the 11th day of May, in the year of our Lord one thousand nine hundred and twenty-seven, and of the independence of the United States of America the one hundred and fifty-first.

Lauren Pierce,
*Clerk of the District Court of the United States,*
*Western District of Kentucky.*

Allowed by

———— ————, *Judge.*

* Not exceeding 30 days from the day of signing the citation.

In United States District Court

*Cross-writ of error*

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH JUDICIAL CIRCUIT.

*The President of the United States to the honorable the Judge of the District Court of the United States for the Western District of Kentucky, Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you or some of you, between A. J. A. Alexander and Robert H. Lucas, collector of internal revenue for the district of Kentucky, a manifest error hath happened, to the great damage of the said A. J. A. Alexander, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the clerk of the United States Circuit Court of Appeals for the Sixth Circuit together with this writ, so that you have the same at Cincinnati, Ohio, in said circuit, on the* 10 day of June next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable William H. Taft, Chief Justice of the United States, the 11th day of May, in the year of our Lord one thousand nine hundred and twenty-seven and of the independence of the United States of America the one hundred and fifty-first.

LILBURN PHELPS,
*Clerk of the District Court of the United States,*
*Western District of Kentucky.*

Allowed by

——— ———, *Judge.*

In United States District Court

*Waiver of citation*

Citation to defendant in error and to plaintiff on cross error to writ of error filed in the clerk's office on May 11, 1927, in the above-styled action is hereby waived by both plaintiff and defendant in error.

T. J. SPARKS,
*Attorney for Plaintiff in Error.*
ELWOOD HAMILTON,
*Attorney for Defendant in Error.*

*Not exceeding 30 days from the day of signing the citation.

## In United States District Court

*Defendant's praecipe*

**Filed May 23, 1927**

You are requested to take a transcript of record to be filed in the United States Circuit Court of Appeals for the Sixth Circuit pursuant to writ of error allowed in the above-styled case, and to include in such transcript of record the following and no other papers or exhibits, to wit:

Petition, including exhibits filed therewith as part thereof;
Amended petition;
Answer;
Amended petition;
Amended answer;
Order permitting depositions to be taken;
General demurrer;
Judgment and finding of fact;
Order extending time for filing bill of exceptions;
Bill of exceptions;
Order filing bill of exceptions;
Plaintiff's petition for writ of error;
Plaintiff's assignment of errors;
Defendant's petition for writ of error;
91 Defendant's assignment of errors;
Order allowing writ of error for both.

Respectfully,

T. J. SPARKS,
*United States Attorney,*
*Attorney for Defendant.*

## In United States District Court

*Clerk's certificate*

I, LILBURN PHELPS, clerk of the District Court of the United States for the Western District of Kentucky, do hereby certify that the foregoing transcript of record, consisting of 90 pages, contains a full, true, and complete copy of all pleadings, record entries, and proceedings in the case of A. J. A. Alexander versus Robert H. Lucas, collector of internal revenue for the district of Kentucky, made and copied in accordance with the praecipe of counsel copied on page 90 of this record as the same appears from the original thereof on file and of record in my said office.

It is further certified that no præcipe was filed by counsel for plaintiff, A. J. A. Alexander, and his counsel advised the clerk that none would be filed.

[SEAL.] LILBURN PHELPS, *Clerk.*

92 [Appearance of counsel omitted in printing.]

In United States Circuit Court of Appeals, Sixth Circuit

*Motion to dismiss*

Filed Dec. 22, 1927

The appellee moves the court to dismiss the appeal filed herein—

First. Because the appellant filed its bill of exceptions in the lower court on April 30, 1927 (R. p. 52), and its assignment of errors May 11, 1927, in violation of rule 10 of this court, and he asks that this motion be passed to the hearing on the merits.

BECKHAM, HAMILTON & BECKHAM,
*Attorney for Appellee.*

I have this day received a copy of the above motion, December 21, 1927.

FRANK A. ROPKE,
*Attorney for Appellant.*

93 [Minute entry of argument and submission Feb. 17, 1928, omitted in printing.]

In United States Circuit Court of Appeals, Sixth Circuit

*Judgment*

Filed June 30, 1928

Error to the District Court of the United States for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed.

94 [File endorsement omitted.]

Nos. 4973, 4974

In United States Circuit Court of Appeals, Sixth Circuit

ROBERT H. LUCAS, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT of Kentucky, plaintiff in error in No. 4973, defendant in error in No. 4974

against

A. J. A. ALEXANDER, DEFENDANT IN ERROR IN No. 4973, PLAINTIFF IN error in No. 4974

Error and cross error to the District Court of the United States for the Western District of Kentucky. Decided June 30, 1928

*Opinion*

Filed June 30, 1928

Before DENISON, MACK, and MOORMAN, Circuit Judges.

MACK, Circuit Judge: Error and cross error from a judgment for plaintiff in the sum of $6,519.36, with interest, part of an additional assessment collected from him as income tax for the year 1919.

The New York Life Insurance Company, a mutual company, issued to plaintiff, then aged 24, two policies, effective May 19, 1899, in the aggregate face amount of $100,000.00, called "insurance bond with guaranteed interest." The annual premium was $7,810.00. In case of death within the first ten years only the face amount, $100,000.00, was to be paid; if death occurred within the second ten years, the amount payable would be in excess of $100,000.00, a guaranteed sum increasing year by year, and reaching a maximum of $144,300.00 in the twentieth year. In case of death during the year which included March 1, 1913—that is, the year ending May 19, 1913—$114,000.00 would thus have been payable. If the insured was alive at the end of the twentieth year—that is, on May 19, 1919—

the face of the policy became payable, and in addition
95 thereto a cash dividend then to be apportioned by the company.

Certain optional rights were given at the end of the twentieth year, but they are not important for the purposes of this case. The policy was payable to the estate of the insured; he had the right to change the beneficiary.

The guaranteed loan or cash surrender value which began in the third year amounted to $79,400.00 in the year ending May 19, 1913. In order fairly to determine the dividend apportionable at the end of 20 years the company kept a record called "Funds provisionally ascertained and held awaiting apportionment" for each policy. This provisional fund increased yearly; to it were allocated the dividends that would otherwise have been paid annually with the interest

earned thereon and the pro rata share of the similarly provisionally accumulated dividends of those policyholders in the same class who died before the end of the 20-year period. On March 1, 1913, the company had thus provisionally set aside on its books $13,600.00 for plaintiff's policies. As of that day, its accountants would have estimated that on the assumption of surplus increase during the ensuing six years at the same rate as during the past fourteen years the dividend payable to plaintiff, if alive on May 19, 1919, would be $19,428.57. The actual course of events was that the rate of increase of the surplus was accelerated during the next six years, so that the amount actually paid to plaintiff in 1919 was $20,797.00 in addition to the $100,000.00 face amount of the policies.

Of the amount plaintiff received, he reported $17,238.35 as income for the year 1919, claiming that the remaining $103,560.65 represented the March 1, 1913, value of his policy. The Commissioner of Internal Revenue, reauditing his return, found the taxable gain to have been $42,697.00, the difference between the amount received, $120,797.00, and the amount paid out in premiums during the 20 years, $78,100.00. Value as of March 1, 1913, was disregarded. Pursuant to demand, plaintiff paid an additional assessment of $8,750.91 and brought this action for its return.

The district court found the taxable gain $27,209.19 over the March 1, 1913, valuation of $93,587.81 on this reasoning: As plaintiff on March 1, 1913, was normally healthy and thirty-eight years old, the chances of his living out the full 20 years and then receiving $119,428.57 in the policies were very good. Discounting that sum at the rate of 4% annually for the six years 2 months and 19 days gave $93,587.81, the value on March 1, 1913, as found by the court.

96 The applicable statutory provisions are sections 202 and 213 of the revenue act of 1918, 40 Stat. 1060, 1065, as follows:

SEC. 202. (a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—

(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; * * *

SEC. 213. That for the purpose of this title (except as otherwise provided in section 233) the term "gross income"—

(a) Includes gains, profits, and income derived from * * * sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but

(b) Does not include the following items, which shall be exempt from taxation under this title:

(1) The proceeds of life-insurance policies paid upon the death of the insured to individual beneficiaries or to the estate of the insured;

(2) The amount received by the insured as a return of premium or premiums paid by him under life insurance, endowment, or annuity contracts, either during the term or at the maturity of the term mentioned in the contract or upon surrender of the contract. * * *

Regulations 45 (1920 edition) provide in article 72b: "During his life only so much of the amount received by an insured under life, endowment, or annuity contracts as represents a return, without interest, of premiums paid by him therefor is excluded from his gross income."

It is contended by plaintiff that the proceeds of life-insurance policies are not constitutionally taxable as income, but that if they are then the correct method of determining the taxable gain in the present case is to subtract from the amount received a sum equal to the face of the policy plus the dividends which had been provisionally determined by March 1, 1913. Defendant contends
97 that the policies are taxable, at the difference between the amount received and either the amount of premiums paid or the cash surrender value on March 1, 1913.

Plaintiff contends that the proceeds of life-insurance policies do not constitute income within the Sixteenth Amendment. In United States v. Supplee-Biddle Hardware Company, 265 U. S. 189, the Supreme Court expressly refrained from deciding whether life insurance paid on the *death* of a corporate officer could constitutionally be taxed as income to the corporation which had insured him. The instant policy is an endowment; payment thereof was made in the lifetime of Alexander, to himself. The policy, like all endowment policies, was a combination of life insurance and investment. When paid, there enured a clear profit to the insured, a profit that is as much income within the constitutional amendment as any profit gained in a business transaction. The provisions of the 1918 act above quoted are clearly broad enough to include gains from insurance transactions other than the two specific exemptions.

The second question is as to the applicability of Treasury Regulation 45, article 72b, under which the commissioner proceeded. Attempts to support it on the ground of settled administrative practice must fail, not only because the Government relies for proof of the continuity of the practice upon later regulations promulgated after the assessment in dispute and under different statutes, but also because the regulation is contrary to law in so far as it attempts to regulate income tax on proceeds of insurance policies having a fair market price or value on March 1, 1913. The act which it interprets says that to ascertain gain from the disposition of property, the excess over the March 1, 1913, fair market price or value of that property should be taken. An insurance policy is of course property

within the statute. Its value as property is not necessarily equal to its cost; it may as well be more or less.

We come, then, to the question of the March 1, 1913 value of the policies. Defendant contends for surrender value on the ground that the only way the insured could have realized on his policies in 1913 was by surrendering them. Plaintiff contends for the then value to the insured because of the lack of a market price, due to their non-assignability to a stranger. That value, plaintiff further contends, was $113,600.00, the face of the policies plus $13,600.00 of surplus then provisionally credited to him on the company's books, since it was reasonably certain that plaintiff would get at least that sum.

He argues that the probability of further additions to surplus
98 during the time plaintiff had to wait for the money neutralized the six years' postponement of enjoyment, so that no discounting was necessary to find present value.

The only reported litigation involving the valuation of an insurance policy for Federal income-tax purposes which has been found is Appeal of Kline, 3 B. T. A. 1138. There the taxpayer held a policy of the New York Life Insurance Co. in the amount of $10,000.00, issued in 1902 and fully paid up in 1912 by ten annual premiums of $965.20, on which policy no dividends or other distribution was to be made until 1922, when the insured exercised the option to receive $14,830.10 in cash. The surrender value March 1, 1913, was $9,070.00. The commissioner based the tax for 1922 upon the difference between the surrender value on March 1, 1913, and the total paid in 1922. He was sustained by the Board of Tax Appeals. However, the sole ground of the taxpayer's appeal was that the amount of premiums paid should have been subtracted rather than the surrender value. A method similar to that employed by the district judge in the present case was not urged and would have been still more unfavorable to the taxpayer.

Kentucky Tobacco Products Co. v. Lucas, 5 Fed. (2d) 723, involved the valuation as of March 1, 1913, for the purpose of measuring depreciation under the income tax of a contract right to make future purchases of raw materials at highly advantageous prices. The method of valuation employed was to find how much profit would be received by the taxpayer under the contract during the years it had to run and then to take the present value in 1913 of this amount by discounting on a 5% interest basis.

Plaintiff's situation on March 1, 1913, was as follows: If he lived until 1919, he could reasonably expect then to realize about $120,000 on the policies. The present value of that sum we may take as $93,587.81, since the details of the trial judge's calculations are unimpeached. The amount payable to the estate in case of death between March 1, 1913, and May 19, 1919, would have ranged from a minimum of $114,000 to a maximum of $144,000.

It follows, therefore, if the policy had been salable its market value on March 1, 1913, would clearly have been no less than $93,587.81, the then discounted value of the amount in all probability payable at maturity, inasmuch as the purchaser would have had an

excellent investment with the chance of a very heavy increase in case the insured died before maturity.

If an assignable policy were worth this amount in the market, then the nonassignable policy was worth the same amount to the insured.

99 It is true that plaintiff could have realized only $79,400.00 from the policies by surrendering them. But he was under no obligation to make this less advantageous disposition of his property. The statement in In re Newland, 18 Fed. Cas. 92, approved in Hiscock v. Mertens, 205 U. S. 202, 212, that the present value of an insurance policy is its surrender value, was a dictum with reference to valuation for bankruptcy purposes. It involves wholly different considerations. The loan or surrender value of plaintiff's policies was not a "market price." Moreover, section 202 does not make market price the sole criterion; it permits deduction of fair market price or *value*, and since the latter phrase is set in opposition to the former, value to the owner may be taken as the alternative to market price.

Plaintiff Alexander's assignments of error in No. 4974 are without merit. The attempt is made, by reasoning not entirely clear, to take the face of the policy plus the provisionally apportioned dividends as the value in 1913. If the theory of this is that plaintiff was sure to get at least that amount in 1919, there is the obvious objection that plaintiff has lost sight of the fact that a future accruing sum must be discounted to find its present value. If, on the other hand, plaintiff's theory is that the provisionally credited dividends in 1913 represented in part the intrinsic value of the policy, this runs counter to New York Life Insurance Co. v. Edwards, 271 U. S. 109, affirming 8 Fed. (2d) 851, which made clear that holders of policies such as the one here in question have absolutely no interest in such dividends until the maturities of their policies.

Judgment affirmed.

100 In United States Circuit Court of Appeals

*Motion to stay mandate*

Filed July 25, 1928

Now comes plaintiff in error in No. 4973 and defendant in error in No. 4974 and moves the court to stay issuance of mandate in said appeals until September 3rd, 1928.

FRANK A. ROPKE,
*Counsel for Plaintiff in Error, No. 4973;*
*Defendant in Error, No. 4974.*

Service accepted and receipt of copy of the motion to stay proceedings received this ——— day of July, 1928.

(Signed) ELWOOD HAMILTON,
*Counsel for Defendant in Error, No. 4973;*
*Plaintiff in Error, No. 4974.*

In United States Circuit Court of Appeals

*Motion to stay mandate*

Filed Aug. 22, 1928

Now comes plaintiff in error in No. 4973 and defendant in error in No. 4974 and moves the court to stay issuance of mandate in said appeals until September 30, 1928.

FRANK A. ROPKE,
*Counsel for Plaintiff in Error, No. 4973;*
*Defendant in Error, No. 4974.*

Service accepted and receipt of copy of the motion to stay proceedings received this 20th day of Aug., 1928.

(Signed) ELWOOD HAMILTON,
*Counsel for Defendant in Error, No. 4973;*
*Plaintiff in Error, No. 4974.*

[Clerk's certificate to foregoing transcript omitted in printing.]

102 Supreme Court of the United States

*Order allowing certiorari*

Filed November 19, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Indorsement on cover:) File No. 33,790. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 481. Robert H. Lucas, Collector of Internal Revenue for the District of Kentucky, petitioner, *vs.* A. J. A. Alexander. Petition for writ of certiorari and exhibit thereto. Filed September 28th, 1928. File No. 33,790.

○

On May 19, 1919, Rep received $120,797.00 - face of policies and dividends of $20,797.00

Rev Com'n computed gain as follows:

120,797.00 - Received
78,100.00 - paid on Mar 1, 1913
$42,697.00 gain

Rev de computed —

120,797.00 - Received - and deducted therefrom Mar 1, 1913 value arrived at which he computed as follows:
93,577.81
$27,219.19

as of Rep. was [illegible]
3-1-13 [illegible]
$ 119,438.51 - capitalized at 4% gave present worth on Mar 1, 1913 of 93,577.81
[illegible] 3-1-1913

Supporting that Conclusion Cla paid:

1 Rev determining question is Mar 1, 1913 value Amount [illegible] 3-1-13 and May 19, 1919 would have ranged from 114,000 to 124,000/ If he lived we would not get that sum but dividend accumulations. To discount those accumulations would be to arrive at very fair value - if insured lived the accumulations - if he died, the heavy increase in face value

2 Cada [illegible] 3-1-13 [illegible]

Two argues:

§ 213 gives a definition of taxable gain. It makes a special definition for insurance policies [illegible] Regs [illegible] must be followed rather than [illegible]

Congress took Cost Rather Than cash surrender value as fourth method, eliminating [illegible]

But if you do follow § 202, the definition of Market Value is wrong. It is based upon a Contingency - Receipt of premiums - which may or may not occur.

[illegible] - after full payment of premiums
20 other companies varying amts payable to insured in case of death prior to end of accumulation period
[illegible] $144,500

It also specified Cash surrender or guaranteed loan values.

$1104,000 would never been payable in case of death.

On Jan 1, 1913, the situation was this:

Resp. was 35 yrs. old, normally healthy & with good expectations of living out the term. He had paid out $8,100 in premiums. His policies had Cash surrender values of 79,400. [illegible] 1-1913, 13,600 at once provisionally [illegible] and normal expectation was it would amount to 19,495.57